SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, PETITIONER,

vs.

NEEDHAM PACKING COMPANY, d/b/a SIOUX CITY DRESSED BEEF.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

INDEX

	Original	Print
Record from the District Court of Woodbury County		
Petition in equity	3	1
Exhibit A—Collective bargaining agreement between Sioux City Dressed Beef Company and United Packinghouse, Food and Allied Workers, AFL-CIO, dated October 1, 1960	11	7
Exhibits B & C—Grievance Reports 1A and 2A protesting the discharge of employees	36	22
Exhibits D, E & F—Letters from John Davidchik, Field Representative, UPWA, AFL-CIO to Mr. Lloyd Needham, President, Sioux City Dressed Beef Co., dated July 5, 1961, July 12, 1961 and August 10, 1961	38	25
Exhibit G—Letter from Lloyd L. Needham, President, Sioux City Dressed Beef Co. to Mr. John Davidchik, dated July 11, 1961	41	29

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 9, 1963

	Original	Print
Record from the District Court of Woodbury County—Continued		
Defendant's answer, affirmative defenses, legal defenses and counterclaim	42	30
Plaintiff's reply	48	34
Amendment to petition	56	39
Answer to plaintiff's amendment to petition	58	40
Application to the Court to separately hear and determine points of law raised in the pleadings under R.C.P. 105	60	41
Ruling	61	42
Application to the Supreme Court of the State of Iowa for order granting appeal in advance of final judgment	74	51
Order of Supreme Court of Iowa granting appeal	78	54
Notice of appeal	79	54
In the Supreme Court of the State of Iowa	80	55
Opinion, Hays, J.	80	55
Dissenting opinion, Thornton, J.	86	59
Order staying issuance of procedendo, etc.	87	61
Clerk's certificate (omitted in printing)	88	61
Order allowing certiorari	89	62

[fol. 1] [File endorsement omitted]

[fol. 3]

IN THE DISTRICT COURT OF WOODBURY COUNTY

Equity No. 83728

LOCAL UNION NO. 721, UNITED PACKINGHOUSE FOOD AND ALLIED WORKERS, AFL-CIO, Plaintiff,

vs.

NEEDHAM PACKING COMPANY, INC., d/b/a SIOUX CITY DRESSED BEEF, a corporation, Defendant.

Hon. George M. Paradise, Judge.

PETITION IN EQUITY—Filed August 26, 1961

The plaintiff, Local Union No. 721, United Packinghouse Food and Allied Workers, AFL-CIO, complains of the defendant, Needham Packing Company, Inc., d/b/a Sioux City Dressed Beef, and alleges as follows:

1. Plaintiff, Local Union No. 721, United Packinghouse Food and Allied Workers, AFL-CIO (hereinafter referred to as the Union) is an unincorporated association with its principal office in Sioux City, Iowa. Plaintiff Union is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (29 U. S. C. 152(5)) and Sections 301(a) and 501(3) of the Labor Management Relations Act of 1947 (29 U. S. C. 185(a), 142(3)). The Plaintiff admits to membership and is the collective bargaining representative of certain employees of the defendant, Needham Packing Company, Inc., d/b/a Sioux City Dressed Beef, in the Meat Packing Plant of the said defendant located in Sioux City, Iowa. Plaintiff represents employees in an industry affecting commerce within the meaning of Sections 301(a) and 501(1) of the Labor Man-

[fol. 4] agement Relations Act of 1947, 29 U. S. C. 185, 142(1).

2. Defendant, Needham Packing Company, Inc., d/b/a Sioux City Dressed Beef, is a corporation organized and existing under and by virtue of the laws of the State of Delaware and does business and maintains its principal place of business in Sioux City, Iowa, where it operates a Meat Packing plant. Defendant is engaged in an industry affecting commerce within the meaning of Sections 301(a) and 501(1) of the Labor Management Relations Act of 1947, 29 U. S. C. 185(a), 142(1).

3. On or about the first day of October, 1960, the plaintiff, representing employees of defendant's Sioux City packing plant, and the defendant entered into a collective bargaining agreement to remain in effect by its terms until October 1, 1961. Said agreement is now, and at all times herein mentioned was, in full force and effect. Said collective bargaining agreement is incorporated herein as though fully set forth and a copy thereof is attached hereto as Exhibit "A". Said agreement covers the terms and conditions of employment of employees engaged in an industry affecting commerce within the meaning of Sections 301(a) and 501(1) of the Labor Management Relations Act of 1947, 29 U. S. C. 185(a), 142(1).

4. Section 33 of the collective bargaining agreement provides a procedure for the adjustment and settlement of grievances, with arbitration as the final step. Subsec- [fol. 5] tion (C) (1) through subsection (c)(4) of Section 33 of the agreement (at page 13 of Exhibit "A" attached to this Complaint) provide for certain steps in the procedure for taking up grievances in meetings between the parties. Subsection 33(c)(5) then provides as follows:

> In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union. Said board of arbitration shall consist of three (3) members, one of whom shall be appointed by the Company and one by the Union and the third

member shall be appointed by the two members so selected. In the event the two members first chosen cannot agree upon a third member within three (3) days after the second member has been chosen, either party may request the United States Mediation and Conciliation Service to submit a list of five (5) names. Each party shall alternately strike a name until one name remains which shall be the name of the third arbitrator of the dispute. Said arbitration board shall [fol. 6] have authority only to interpret and apply the provisions of this contract. Its award shall be in writing and shall be binding upon the Company and Union and upon the employees involved.

The party requesting arbitration shall give written notice of that fact to the other party and shall in such notice furnish the name of its arbitrator, and the opposing party shall within twenty-four (24) hours thereafter appoint its arbitrator and give notice in writing to the other party. The parties shall divide the expense of the third arbitrator.

5. On or about May 17, 1961, the defendant discharged approximately one hundred ninety-one (191) persons employed in positions within the collective bargaining unit covered by the collective bargaining agreement. Grievances protesting these discharges were duly presented to the defendant pursuant to and in accordance with the procedure prescribed in Section 33 of the collective bargaining agreement. The grievance designated No. 1-A requests reinstatement of employee Anton Stamoulis to his position with full seniority rights and pay for time lost as a result of his improper discharge, and the grievance designated No. 2-A requests such reinstatement and other re-[fol. 7] lief for the remaining approximately one hundred ninety (190) employees. Copies of said grievances as reduced to writing and duly presented to defendant are attached hereto as Exhibits "B" and "C", respectively, and incorporated herein by reference.

6. In each of the grievances, it is the contention of plaintiff Union that the discharge by the defendant of the em-

ployees involved on or about May 17, 1961, was improper and in violation of the collective bargaining agreement. Section 8(a) of the collective bargaining agreement (page 2 of Exhibit "A" attached hereto) provides in relevant part as follows:

> The management of the plant and the direction of the working forces, including the right to hire, suspend, or discharge *for just cause* . . . are vested exclusively in the Company provided this will not be used for the purpose of discrimination against any employee or to avoid any of the provisions of this agreement. (Emphasis supplied.)

Section 5(a) (page 1 of Exhibit "A" attached hereto) provides as follows:

> The Company agrees that it will give fair and reasonable consideration to any applicant or employee re-
> [fol. 8] gardless of race, sex, color, creed, nationality, membership or non-membership in the Union.

Section 6 (page 1 of Exhibit "A" attached hereto) provides as follows:

> The Union, its officers and members shall not intimidate or coerce employees into joining the Union or continuing their membership therein, *nor shall the Company intimidate or coerce employees into refusing to join the Union or into discontinuing Union membership.* (Emphasis supplied.)

7. Plaintiff Union had duly complied with the procedures set forth in Section 33(c)(1) through 33(c)(4) of the collective bargaining agreement, and has attempted and has at all appropriate times been ready, and has so informed defendant, to process Grievances No. 1-A and 2-A in accordance with the contractual provisions referred to and has repeatedly requested defendant to comply with its obligations to process said grievances in accordance with the contract. Copies of letters dated July 5, 1961 and July 12, 1961 sent by plaintiff to defendant are attached hereto as

Exhibits "D" and "E" respectively and made a part hereof by reference. Defendant made no response to plaintiff's letter of July 12, 1961, and responded to plaintiff's letter of July 5, 1961, with a notice that it was refusing to deal [fol. 9] with plaintiff for any purpose as appears more fully in paragraph 9 of this Complaint.

8. By letter to defendant dated August 10, 1961, plaintiff requested arbitration of Grievances No. 1-A and 2-A in accordance with Section 33(c)(5) of the collective bargaining agreement. In this letter plaintiff furnished the name of its arbitrator of the disputes, offered to pay one-half the expense of the third arbitrator and reminded defendant of its obligation to appoint its arbitrator and give written notice of that fact to the Union within twenty-four (24) hours, all in accordance with Section 33(c)(5) of the collective bargaining agreement. A copy of plaintiff's letter to defendant of August 10, 1961 is attached hereto as Exhibit "F" and made a part hereof by reference. Defendant has failed to designate its arbitrator as required by Section 33(c)(5) of the collective bargaining agreement and has made no response to plaintiff's letter of August 10, 1961.

9. Defendant has at all times continued and does now continue to refuse to process Grievances No. 1-A and 2-A and to proceed to arbitration therewith as required by Section 33(c)(5) of the collective bargaining agreement, notwithstanding the fact that plaintiff has complied fully with the provisions of Section 33, including subdivision (c)(5) insofar as is possible in view of defendant's refusal to proceed to arbitration. By letter dated July 11, 1961, [fol. 10] defendant, by its President and General Manager, wrote plaintiff that it was refusing to meet with plaintiff for the purpose of processing Grievance No. 1-A and 2-A. Defendant still refuses to meet with plaintiff for this purpose. A copy of defendant's letter dated July 11, 1961, is attached hereto as Exhibit "G" and made a part hereof by reference.

10. By its action and conduct aforesaid the defendant herein has breached and continuing to breach the collective bargaining agreement with plaintiff herein and more spe-

cifically the provisions of Section 33(c)(5) thereof, providing for arbitration as the final step in settlement of disputes, and is therefore depriving plaintiff Union of its contractual rights to have the matter in dispute settled in a peaceful and orderly manner as provided by said agreement.

11. This Court has jurisdiction, power, and authority to find and declare that defendant, by failing and refusing to act in compliance with Section 33(c)(5) to refer Grievances No. 1-A and 2-A and the issues in dispute therein to arbitration, is breaching its contract with plaintiff Union; and this Court has jurisdiction, power and authority to restrain and enjoin defendant from refusing to proceed to arbitration as hereinabove set forth; and this Court has jurisdiction, power and authority to issue an order directing that defendant act in accordance with the provisions of Section 33(c)(5) of the collective bargaining agreement [fol. 11] to refer the matter in dispute in Grievances No. 1-A and 2-A to arbitration.

Wherefore, plaintiff prays that this Court enter an Order adjudging and decreeing that the defendant has violated and is violating the above described collective bargaining agreement; enjoining defendant from failing and refusing to arbitrate Grievances No. 1-A and 2-A; ordering defendant to refer said grievances and the matters in dispute therein to arbitration in accordance with and pursuant to the terms of the collective bargaining agreement aforesaid, for costs and for such other and further relief as the Court may deem just.

EXHIBIT "A" TO PETITION

AGREEMENT

PREAMBLE

1. This Agreement is made between SIOUX CITY DRESSED BEEF COMPANY, A DIVISION OF NEEDHAM PACKING COMPANY, INC. (hereinafter called the Company) and the UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, (AFL-CIO), on behalf of itself and its Local Union Number 721, (hereinafter, unless otherwise indicated, the word "Union" refers to United Packinghouse, Food and Allied Workers, AFL-CIO, and its Local No. 721).

[fol. 12]

RECOGNITION

2. The Company recognizes the United Packinghouse, Food and Allied Workers, AFL-CIO and its Local No. 721 as the sole and exclusive collective bargaining agency for all the production employees, excluding plant maintenance employees, over-the-road truck drivers, office clerical employees, professional employees, guards, and all other employees and supervisors as defined in the Labor-Management Act of 1947, as amended.

PURPOSE OF AGREEMENT

3. It is the intent and purpose of the parties hereto that this agreement shall promote and improve the industrial and economic relationships between the Company and the Union as set forth herein and to set forth herein rates of pay, hours of work, and other conditions of employment to be observed between the parties hereto.

AUTHORIZED DUES DEDUCTIONS

. . . . . .

EMPLOYMENT POLICY

5. (a) The Company agrees that it will give fair and reasonable consideration to any applicant or em-

[fol. 13] ployee regardless of race, sex, color, creed, nationality, membership or non-membership in the Union.

(b) Employees who have given long and faithful service in the employ of the Company and have become unable to handle their job, will be given preference for such other work as is available. Wages paid to such employee shall be the wages of the position assigned.

NO COERCION

6. The Union, its officers, and members shall not intimidate or coerce employees into joining the Union or continuing their membership therein, nor shall the Company intimidate or coerce employees into refusing to join the Union or into discontinuing Union membership.

CONTRIBUTIONS

* * * * * * *

MANAGEMENT

8. (a) The management of the plant and the direction of the working forces, including the right to hire, suspend, or discharge for just cause, to assign to jobs, to transfer employees temporarily within the plant, to increase and [fol. 14] decrease the working force, to determine products to be handled, produced or manufactured, the schedules of production, and the methods, processes, and means of production of handling, are vested exclusively in the Company provided this will not be used for the purpose of discrimination against any employee or to avoid any of the provisions of this agreement.

(b) The Company shall give consideration in hiring to persons formerly employed by the Company whose services were satisfactory.

NO STRIKE OR LOCKOUT

9. It is agreed that during the period of this agreement the employees shall not engage in and the Union shall not

call or sanction any slow down, work stoppage or strike, and no lock out shall be inaugerated by the Company.

HOURS OF WORK

• • • • • • •

HOLIDAYS

• • • • • • •

[fol. 15]

FURNISHING AND MAINTAINING CLOTHES, TOOLS, SAFETY EQUIPMENT, TOOL PREPARATION TIME

• • • • • • •

RELIEF PERIODS

• • • • • • •

GUARANTEED TIME

• • • • • • •

SENIORITY

19. (a) Seniority will operate on a combination department and plant basis.

(b) Employees shall be regarded as probationary for the first thirty (30) days following the date of employment. There shall be no Company responsibility for the re-employment or continuing of employment of probationary employees. After an employee has completed his probationary period, his seniority date shall be the first day of his employment. His seniority department will be where he is regularly assigned on the date which he completes such thirty (30) days of service.

(c) An employee shall have no plant seniority until he has two (2) years of seniority. However, an employee with [fol. 16] no plant seniority shall be accumulating plant service after he has completed his thirty (30) days probationary period. Plant seniority shall date from the original date of hire subsequent to which service has not been broken by any circumstances listed below:

(1) Voluntarily leaves the service of the Company or is discharged for cause.

(2) Failure to return to work when recalled or cannot be located upon reasonable effort on the part of the Company.

(3) Has been in lay off status by the Company for a period of eighteen (18) months.

For the purpose of these seniority provisions only, time that an employee is on lay off status shall be credited to both his plant and departmental seniority.

(d) Both plant and department seniority lists shall be posted in all departments. An over-all plant seniority list will be posted at the time clock near the entrance. If no objections are made to the revised seniority list within thirty (30) days of such posting, then all objections shall be considered waived and such seniority lists shall be final [fol. 17] and binding. Lists must be kept up to date every ninety days. A copy of seniority lists shall be furnished to the local union. Such seniority lists shall be submitted by the Company and agreed to in writing by the parties prior to the signing of this contract, and such lists as agreed upon shall be final and binding.

(e) Gang reduction will be governed by department seniority. Plant seniority shall be followed in determining which employee shall be laid off from the plant.

(1) An employee having plant seniority who is laid off from his own department because of a gang reduction shall have the right to displace the junior employee in the plant, provided the man can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure. Or in the alternative, the employee may go off the payroll without losing his department seniority in his own department. If the employee displaces the

junior employee in the plant, he shall establish temporary department seniority in the department in which he goes and suffer no loss of seniority in his own department. [fol. 18] When his original department is increased again, he shall be recalled according to his original department seniority. If he fails to return to his original department, he shall forfeit his original department seniority and seniority in the new department shall become permanent from his date of entry into the new department.

(2) If the employee elects to go off the payroll rather than to misplace the junior employee in the plant, he shall have rehiring rights according to his department seniority. In addition, he shall have rehiring rights under the plant seniority provision, provided he gives the Company three (3) days' written notice to return to any job open in the plant that becomes available. He shall be called to his original department when it is increased in line with his department seniority.

(f) If at the time of layoff in any department there are vacancies in other departments which cannot be filled under any other seniority provisions of this Agreement, the employees being laid off shall have the right at the time of layoff to select the department and shift to which they shall have the right to be assigned in filling of such vacancies in accordance with plant seniority, provided the man can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a rea- [fol. 19] sonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

(g) Order of Recall—Seniority departments will be increased as follows:

FIRST — By calling back according to department seniority those employees having plant seniority, provided the employee can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be con-

sidered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

SECOND — By calling back according to plant seniority those employes who have plant seniority, provided they can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time, unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

[fol. 20]

THIRD — By calling back according to department seniority those employes who are off the payroll and who do not have plant seniority, provided that the employee can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

Plant seniority shall not be construed so as to allow an employee with plant seniority to bump into another department except when such employee is actually working and there is a layoff within such employee's own department.

(h) Promotions and filling vacancies—

(1) Promotions within the unit shall be made according to department seniority, provided the employee can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or

[fol. 21] arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

(2) A job shall be deemed vacant and open by reason of rearrangements within a gang necessitated by gang increase; and when it is open because of permanent separation from the payroll of the regular holder of such job, or after the regular holder of such job has been absent for more than seven (7) consecutive calendar days.

(3) Except where a job is vacant as defined in (h) (2) above, the Company may disregard seniority in filling a job, provided the Company knows that the regular holder of a job will not be absent for more than seven (7) consecutive days. Upon the return to work of the regular holder of the job, the employee who filled the job while such regular holder was absent shall be returned to his former job, provided, however, that there shall be no vacancy under the foregoing sections when the regular holder of the job is on vacation.

(4) As to any employee, a promotion is involved only when the rate of the job classification in which the vacancy occurs is higher, the same, or lower than the authorized rate of the job to which the employee is regularly assigned, provided the employee can perform the job or qualify [fol. 22] within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure. An employee who is absent and whose seniority entitles him to the job shall be offered the job when he returns to work unless the vacancy has already been filed by an employee with the greater seniority.

(5) The Company shall also post such vacancy in the department wherein it exists and an employee with greater seniority in the department shall have forty-eight (48) hours to bid for the job and shall be assigned in line of seniority as soon as practicable, provided the employee

can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure. An employee who is absent and who has greater seniority than the employee placed in the last vacancy shall have the right, upon [fol. 23] his return, to be placed on such job if he makes request within forty-eight (48) hours after he returns to work, provided the employee can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure. When the employee with greater seniority has been assigned to a job as a result of the bidding procedure above, all previous bids for that job will thereafter be called null and void.

(6) When jobs are eliminated or changed so as to require the assignment of employees, employees will be demoted from jobs and moved up to jobs in accordance with the rules now applicable for gang arrangements necessitated by increase or decrease in the department.

(7) Employees leaving the bargaining unit to accept a job with the Company outside of the unit shall retain their plant seniority rights in the unit for a period of one (1) year and their department seniority rights in the unit for a period of six (6) months provided they remain in the department, and department seniority rights for ninety (90) days if they leave both the unit and the department. [fol. 24] Any employee who moves out of the bargaining unit more than once in a twelve (12) month period except in an emergency or for temporary relief in case of illness or a vacation, shall lose all seniority rights under this Agreement.

(j) Employees will be transferred from one department to another according to the following terms: At the Company's or the employee's request for a period not to exceed ninety (90) days without losing his seniority status within his own department, provided, however, that no employee shall be transferred to the same department more than once within a twelve (12) month period. If the employee decides to return to his original department within the ninety (90) day period he shall be permitted to do so without loss of department seniority. If he remains in the department to which he is transferred, beyond the ninety (90) days, he shall forfeit seniority in his original department. He shall establish seniority in the new department from his first day there, provided he does not return to his original department within the ninety (90) day period. When an employee is on such transfer from his original department and his original department is reduced within the ninety (90) day period, he must elect at the time of such reduction either to stay in the department or to return to his old department and be assigned according to his plant seniority, unless such employee [fol. 25] elects to forfeit his seniority in his old department and remain permanently in the new department.

A record will be kept in the employment office of employees desiring transfers to other departments; such opening will be filled from the list of employees desiring a transfer to such department in accordance with: (The Company shall have no financial liability to any employee or to the Union in the event an error or mistake is made by the Company in the application of this paragraph, provided this shall not apply to financial liability to the Company for its failure to follow the contract subsequent to the time a formal claim is made against the Company.)

First: Their plant seniority, and

Second: Their accumulated plant service, provided the employee can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Com-

pany has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

No permanent transfer from one department to another shall be made except with the consent of the employee in-
[fol. 26] volved, which shall be in writing.

Employees transferred to a new department created by the Company shall, upon closing of the department, have the right to return to the department from which transferred and shall retain the seniority which such employee would have had had they remained in their original department, provided, however, that in the event such employee has been in the new department for one year, then he shall lose his seniority in his old department.

(k) In increasing working forces according to seniority, employees laid off will be notified by the present method of contact, or by telegram, or registered letter at the employee's last known address, and they will be expected to report as directed. Failure to do so or failure to accept the job offered, subject to the provisions above shall forfeit their seniority rights. However, in cases of inability to do so and upon immediate notification to the Company of this fact, they will be given five (5) additional days. Employees who are unable to return within this five (5) day period, because of sickness or accident, will be given additional time within which to report, such time not to exceed the period that such disability, as shown by acceptable medical evidence, prevents their return to work.

[fol. 27] (l) No employee outside of the bargaining unit will be used on work of the same nature as that performed by employees in the bargaining unit where a result is to deprive an employee within the unit of work, except when a foreman must break in new operators on a new job, or temporarily in an operator's place who has failed to show up for work, or relieved due to injury or sickness.

(m) Employees with established seniority who are working on the night shift will be part of the seniority group comprised of day and night shift employees may, whenever a day shift job becomes permanently vacant in such seniority group, (subsequent to the date they last began work on

the night shift), transfer to the day shift job provided: (1) no employee of greater departmental seniority requests it; (2) provided the man can perform the job or qualify within a reasonable time. Not to exceed thirty (30) days shall be considered a reasonable time unless the Company and the Union mutually agree to extend such time. In the event the Union or the employee involved feels that the Company has acted unfairly or arbitrarily, then this may be treated as a grievance and processed under the grievance procedure.

VACATIONS

. . . . . .

[fol. 28]

LEAVE OF ABSENCE

. . . . . .

JURY DUTY

. . . . . .

SEPARATION ALLOWANCE

. . . . . .

SICKNESS AND ACCIDENT POLICY

. . . . . .

LIFE INSURANCE

. . . . . .

STATE OR FEDERAL STATUTES

26. Nothing in this Agreement shall require the Company or the Union to take any action which shall be unlawful by reason of any applicable present or future state or federal statute.

MILITARY SERVICE

. . . . . .

[fol. 29]

BULLETIN BOARDS

• • • • • • • •

HOSPITAL-SURGICAL-MEDICAL, POLIO AND DIAGNOSTIC INSURANCE

• • • • • • • •

WORKING CONDITIONS

30. This instrument constitutes the entire contract between the parties hereto, and the Company, the Union, and its members will abide by it. Its provisions and the rights of the parties shall in no way be altered by reason of any by-laws, rules, regulations or customs of the Union. The Company shall not be bound to grant any additional demands which may be made by the Union upon the Company, except to comply with the terms hereof.

SAFETY

31. The Company will continue its present policy in regard to the safety committee, provided, however, that the stewards may bring ideas or complaints directly to the general manager and the stewards may be invited to discuss such ideas with the safety committee.

[fol. 30]

WAGES

• • • • • • • •

ADJUSTMENT OF GRIEVANCES

33. (a) A shop committee composed of not more than six (6) employees shall be designated by the Union for the purpose of handling grievances. Meetings between this shop committee and the Company representative shall be arranged between these two groups on a mutually satisfactory basis.

(b) Any grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance, excluding the date of such occurrence, or within fourteen (14) days of the time the Union has knowledge, or should

have had knowledge of such grievance, or it shall be considered completely waived.

(c) Grievances shall be handled in the following manner:

(1) Between the foreman and the aggrieved employee with or without the show steward, provided, however, that the union can bring the grievance if the employee involved refuses to file such grievance.

(2) Between the general manager and the aggrieved em- [fol. 31] ployee with the department steward and/or the chief steward, or a member of the bargaining committee in the absence of the chief steward.

(3) If said adjustment of such grievance shall not thereby have been reached, it shall be handled by the grievance committee, with or without a national representative of the Union, and designated Company representatives. At this stage, the grievance shall be presented in writing, and when and if settlement is reached, said settlement shall be written out on the back of the grievance sheets and signed by both parties.

(4) If the grievance is not then settled within three (3) days, the shop committee may call on national representatives of the Union to assist in the settlement of such grievance.

(5) In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union. Said board of arbitration shall consist of three (3) members, one of whom shall be appointed by the Company and one by the Union and the third member shall be appointed by the two members so selected. In the event the two members first chosen cannot [fol. 32] agree upon a third member within three (3) days after the second member has been chosen, either party may request the United States Mediation and Conciliation Service to submit a list of five (5) names. Each party shall alternately strike a name until one name remains which shall be the name of a third arbitrator of the dispute. Said

Arbitration Board shall have authority only to interpret and apply the provisions of this contract. Its award shall be in writing and shall be binding upon the Company and the Union and upon the employees involved.

The party requesting arbitration shall give written notice of that fact to the other party and shall in such notice furnish the name of its arbitrator, and the opposing party shall within twenty-four (24) hours thereafter appoint its arbitrator and give notice in writing to the other party. The parties shall divide the expense of the third arbitrator.

HIDE TAKE UP GANG

34. (a) There shall be gang seniority only within the hide take up gang. The present employees within the gang shall agree upon a seniority list among themselves, which list will not show dates of employment, but only show the chronological order of the present employees within the gang.

[fol. 33] (b) The hide take up gang shall be paid at the rate of 17½ cents per hide for taking up and loading. This method of payment is in lieu of all fringe benefits, hourly rates, and premium pay provided for herein for other employees within the bargaining unit.

(c) All portions and articles of this contract shall apply to employees within the hide take up gang, except paragraphs 10 through 20 shall not apply to such employees, nor shall paragraphs 23 through 27, nor paragraphs 29 and 32.

TERMINATION

35. Except as herein otherwise provided, all of the provisions of this Agreement shall take effect as of the date of the execution hereof and shall continue and remain in effect until October 1, 1961, and from year to year thereafter, provided, however, that this Agreement may be terminated effective on October 1, 1961, or effective on October 1, of any year thereafter by either party on written notice mailed by registered mail to the Company at its office in Sioux City, Iowa, or to the Union at the office of the Director of the United Packinghouse, Food and Allied Workers, AFL-CIO, at Des Moines, Iowa at least sixty (60)

days prior to October 1 of any year thereafter. If notice is given by the Company to the Union, the envelope containing the notice shall be addressed to the Director of the [fol. 34] United Packinghouse, Food and Allied Workers, AFL-CIO at his office in Des Moines, Iowa.

Executed at Sioux City, Iowa on this 1st day of October, 1960.

SIOUX CITY DRESSED BEEF COMPANY,
A DIVISION OF NEEDHAM PACKING
COMPANY, INC.

By Jerry P. Kozney
Vice-President (s/s/

UNITED PACKINGHOUSE, FOOD AND
ALLIED WORKERS, AFL-CIO

Ralph Helstein
International President (s/s)

G. R. Hathaway
International Sec'y-treas. (s/s/)

Dave Hart
District Director (s/s/)

John Davidchik
Field Representative (s/s/)

[fol. 35]

COMMITTEE

Richard J. Weathers
(s/s)

Antona Stamoulis
(s/s)

Emery Hines
(s/s)

Alex Thomas
(s/s)

Henry Hofeldt
(s/s)

Vergil Sherman
(s/s)

[fol. 36]

EXHIBIT "B" TO PETITION

COPY TO THE INTERNATIONAL OFFICE FORM NO. 12 UPWA

GRIEVANCE REPORT NO. 1-A

UPWA LOCAL 721 COMPANY Sioux City Dressed Beef

ADDRESS Sioux City, Iowa

Date 7-5-61 DEPARTMENT Beef Kill RATE OF PAY

NAMES AND CLASSIFICATION OF EMPLOYEE(S) INITIATING GRIEVANCE

STATEMENT OF GRIEVANCE: The Grievance Committee is requesting the reinstatement of Anton Stamoulis with full seniority rights and pay for all time lost because of the fact that he was improperly discharged.

2. FACTS AS AGREED UPON BY BOTH PARTIES

3. ISSUE (THE POINTS OF FACT AND PRINCIPLE ON WHICH THERE IS DISAGREEMENT BETWEEN THE PARTIES.)

We, the undersigned employees involved in the grievance, specifically authorize the Union as our collective bargaining agent to make any settlement of this grievance which they believe is justified under all the facts and circumstances of the case as they may be developed through the various steps of the grievance procedure.

.....

.....

If additional space is needed for Items 1, 2 and 3 use a separate sheet of paper and attach to this report.

[fol. 37]

Exhibit "C" to Petition

COPY TO THE INTERNATIONAL OFFICE — FORM NO. 12 UPWA

GRIEVANCE REPORT NO. 2-A

UPWA LOCAL 721 COMPANY S. C. Dressed Beef ADDRESS Sioux City, Iowa

DATE 7-5-61 DEPARTMENT General Grievance RATE OF PAY

NAMES AND CLASSIFICATION OF EMPLOYEE(S) INITIATING GRIEVANCE

STATEMENT OF GRIEVANCE

The Grievance Committee is requesting the reinstatement of all the following employees with full seniority rights and full pay for all time lost because of the fact that they were improperly discharged:

Abbe, William
Anstine, Charles A.
Armstrong, Paul D.
Betu, Joseph B.
Bambin, John
Bekish, Anton
Bekish, Max
Bell, Raymond
Blatchford, Donald K.
Blick, Arie H.
Bolen, William
Brandt, Raymond C.
Boykin, Alfred
Boykin, George
Cameron, Ralph
Campbell, Richard R.
Capers, Oscar D.
Carter, Gilbert
Christianson, Harold
Clift, William
Clifton, William R.
Conway, Louis C.
Covall, Norman
Cowan, Chuck
Cowan, Jerry
Coy, Howard W.
Crawford, Alfred
Crichton, Hubert D.
Crosley, Ross E.
Crowe, Bernard E.
Daniels, Preston
Defasio, Anthony
Richmond, Perry
Rippatoe, A. J.
Risner, Cecil
Robinson, Allen
Schmid, Thomas
Schager, Buell
Schager, Dale
Schexnayder, Walter
Schlezes, Anton
Schrader, James W.
Dutches, Roger
Tuttle, Dale
Ellington, Lonnie
Fields, Mark
Verschoor, Donald
Denney, Harry
Desy, Fred
Dickson, Robert
Fickson, Theo E.
Engel, Melvin D.
Fellwock, Gary P.
Findeisen, Richard
Fowler, Virgil
Frigge, Roman A.
Gomez, Paul R.
Fritz, Arthur D.
Fritz, Earl
Gorsham, Fred
Orsett, Olin
Goulette, Delmar
Grillet, W. W.
Guthmiller, Benjamin
Handke, Joseph
Handke, Melvin
Handke, Portis
Hardgraves, Althemous
Heikes, Dick H.
Henkel, Dale
Henkel, Leon E.
Henkel, Lyle
Hines, Emery
Hinkel, Donald R.
Hints, William F.
Hirshert, Francis
Hledik, E. V.
Shaffer, Edward E.
Shelby, Archie
Shermah, Virgil
Skarnoulis, Al
Skinner, Roy
Smith, Albert
Smith, William
Soloman, Darwin D.
Steinhouser, Ralph
Stevens, William
Twits, Edwin
Stokes, Arthur J.
Smith, Harold
Fondell, James
Pejar, Duane
Hofeldt, Henry
Hoffman, Taft
Horsley, Loren G.
Howard, Robert M.
Hunter, H. M.
Hunter, Rollin L.
Jacobson, John A.
Jager, John G.
Johnson, Clayton
Johnson, Donald
Johnson, Hugh
Johnson, Lenerd
Johnson, Marvin
Johnson, Roger
Jones, Eddie
Jones, Ernest O.
Kern, Robert
Kinnsman, Leo W.
Lemaak, Norman
Larson, Roger
Law, Frank C., Jr.
Leigh, Franklin
Leigh, Richard W.
Lightner, Elvin
Lightner, Harry
Lightner, James
Lockhart, John
Losback, William
Lubanski, Louis
Mann, Donald
Martin, Marion
Stokes, Arthur W.
Streeter, Robert
Stub, Robert
Taubert, Dean

Thomas, Alex	Monk, Richard	Nieman, Albert	Vander Lieth, Henry
Thomas, Marion	Monk, Wayne	Norton, Robert	Wabasha, William
Tobasco, Alex	Meddy, Bert	Nunn, Clarence	Wagner, Allen
Tolliver, Sylvester	Moore, Jerry	O'Dell, Paul	Wagner, Marvin
Tracy, James	Myers, John H.	Ohl, Jack	Wagner, Wallace L.
Tracy, Joseph	McGarr, Francis A.	Owens, Edward	Walding, Phillip
Thompson, Roger	McKenna, Kenneth	Pastz, John H.	Weathers, Richard
Richmond, John	McLane, Neil Jr.	Pinney, Jack	White, Fred
Thomas, Jetson	Nassiff, George J.	Plueger, Ronnie	Williams, Franklin
Matney, Edward	Nelson, Garry L.	Pojar, Patrick	Wilson, Clyde H.
McKelvey, Robert	Niebuhr, Charles	Porter, William A.	Windsor, George N.
Millage, Ronald R.	Nielsen, Cleone J.	Prince, Paul	Wink, Raymond
Miller, Glenn	Nielsen, Kendall	Reed, Francis L.	Yates, Herb
Monk, Larry	Nielsen, Llan	Volosban, John	Zimmerman, Carl

We, the undersigned employees involved in the grievance, specifically authorize the Union as our collective bargaining agent to make any settlement of this grievance which they believe is justified under all the facts and circumstances of the case as they may be developed through the various steps of the grievance procedure.

If additional space is needed for Items 1, 2, and 3 use a separate sheet of paper and attach to this report.

[fol. 38]

EXHIBIT "D" TO PETITION

July 5, 1961

Mr. Lloyd Needham, President
Sioux City Dressed Beef Co.
1911 Warrington Road
Sioux City, Iowa

Attention: Mr. Needham:

Enclosed find copies of Grievances Nos. 1-A and 2-A that we are requesting be processed through the provisions of Section 33, of the Agreement between your Company and Local 721, UPWA, AFL-CIO.

With reference to Grievance No. 1-A it has been previously processed through steps (1) and (2) of (c) of Section 33 and we are desirous that it be placed in step (3) of (c) of Section 33.

As to Grievance No. 2-A since the Company was requested that it be processed in Step (1) of (c) of Section 33 by Anton Stamoulis in a telephone conversation with Mr. Needham on June 28th, 1961 and since Mr. Stamoulis was subsequently advised by Mr. Jesse Marshall, attorney for the Company, that the Company's position was that they would not discuss the grievance because the issue was a matter of unfair labor practice charges filed by the Union, pending before the N.L.R.B., we are advising you that we are withdrawing our charges that have been filed with the N. L. R. B. and are requesting that we immediately proceed to handle the matter in line with the provisions of Section 33 of the Agreement. We are further assuming that your answer to Grievance No. 2-A is negative insofar as steps (1) and (2) of (c) of Section 33 are concerned and are therefore filing a written grievance on this matter as provided for in (3) of (c) of Section 33.

We are requesting an immediate reply as to your position with respect to the further processing of the above mentioned grievance and are willing to meet at your earliest

convenience for the purpose of concluding this matter as provided in Section 33 of the Agreement.

Awaiting an immediate reply, I remain

Very truly yours,

John Davidchik
Field Rep., UPWA, AFL-CIO

JD/jim
upwa 13
cc to: Dave Hart, Director
Eugene Cotton, Attorney
R.R.R.R.

[fol. 39]

EXHIBIT "E" TO PETITION

METROPOLITAN COUNCIL NO. 13
U. P. W. A.-C. I. O.

915 FOURTH STREET PHONES 8-5646—8-4043
SIOUX CITY 1, IOWA

July 12, 1961

Mr. Lloyd Needham, President
Sioux City Dressed Beef, Inc.
1911 Warrington Road
Sioux City, Iowa

Attention: Mr. Needham

Under date of July 3, 1961 a communication was sent to you with reference to Grievances Nos. 1-A and 2-A requesting that they be placed in step (3) of (c) of Section 33 of the Agreement between your Company and Local 721, UPWA, AFL-CIO.

Section 33 provides under (4) of (c) of this section that if a grievance is not settled within 3 days after it is placed in (3) of (c) of Section 33, that it be advanced to (4) of (c) of Section 33. Since we have not heard from you as to

the above grievances since we sent our letter of July 5, 1961, and since the 3 day period provided in (4) of (c) of Section 33 has elapsed, we are assuming that your answer is in the negative and we are therefore requesting that you consider that Grievances Nos. 1-A and 2-A as pending in step (4) of (c) of Section 33 and are requesting that a meeting as outlined in (4) of (c) of Section 33 be held immediately for the purpose of handling the above mentioned grievances. We are prepared to meet for this purpose at any time.

We wish to further state that in the event that we do not hear from you in the course of the next several days that we will consider your position to be again negative and in that event that the grievances be considered as having been processed through steps (1) through (4) of (c) of Section 33 and be pending in (3) of (c) of Section 33.

Again requesting an immediate reply as to your position, I remain

Very truly yours,

John Davidchik, Field Rep.
Dist. 3, UPWA, AFL-CIO

JD/j
upwa 13
RRRR
cc to: Dave Hart
Eugene Cotton

[fol. 40]

EXHIBIT "F" TO PETITION

METROPOLITAN COUNCIL NO. 13
U. P. W. A.-C. I. O.

915 FOURTH STREET PHONES 8-5646—8-4043
SIOUX CITY 1, IOWA

August 10, 1961

Mr. Lloyd Needham, President
Sioux City Dressed Beef Company
1911 Warrington Road
Sioux City, Iowa

Dear Sir:

The Sioux City Dressed Beef Company has been requested previously to process pending Grievances No. 1-A and 2-A in accordance with Section 33 of the collective bargaining agreement in effect between such Company and Local 721, United Packinghouse, Food and Allied Workers, AFL-CIO.

No agreement with respect to Grievances No. 1-A and 2-A having been reached in steps one through four of the collective bargaining agreement as provided in Section 33 (c)(1) through 33 (c)(4) of such agreement, we hereby request arbitration of Grievances No. 1-A and 2-A in accordance with Section 33 (c)(5) of the Agreement. In accordance with Section 33 (c)(5), we hereby give notice that the Union has designated Charles Fischer, as its member of the Arbitration Board, and the Union hereby offers to pay one-half the expense of the third arbitrator.

We remind you that Section 33 (c)(5) requires the Company within twenty-four hours to appoint its arbitrator

and to give written notice to the Union. Would you please advise promptly as to the Company's designation.

Very truly yours,

John Davidchik, Field Rep.
Dist. 5, UPWA, AFL-CIO

JD/j
upwa 13
cc to: Dave Hart
Eugene Cotton
R.R.R.R.

[fol. 41]

EXHIBIT "G" TO PETITION

(Letterhead of Sioux City Dressed Beef Co.,
Sioux City, Iowa)

July 11, 1961

Mr. John Davidcheck

Dear Sir:

Please be advised that we are declining your request of July 5, 1961 to process certain alleged grievances. Your organization and members by your conduct have repudiated and terminated the labor agreement with this Company dated October 1, 1960.

We decline to deal with your organization further because of your action and, moreover, do not recognize your organization as the majority representative of our employees.

Very truly yours,

/s/ LLOYD L. NEEDHAM

[fol. 42]

IN THE DISTRICT COURT OF WOODBURY COUNTY

DEFENDANT'S ANSWER, AFFIRMATIVE DEFENSES, LEGAL DEFENSES AND COUNTERCLAIM—Filed September 13, 1961

Answer

Division I

Comes Now, defendant and for answer says:

1. Admits Paragraph 1 except that defendant states that it has no knowledge as to whether or not plaintiff admits to membership any employees of defendant. Defendant denies that plaintiff is the collective bargaining representative of any employees of defendant. Defendant has no knowledge as to whether or not plaintiff represents any employees in an industry affecting commerce, as referred to in said paragraph.

2. Admits Paragraph 2.

3. Answering Paragraph 3, defendant admits that on or about October 1, 1960, it entered into a contract, copy of which is attached to plaintiff's petition as Exhibit "A". Defendant denies, however, that such agreement is now or at any time material to this cause was in effect.

4. Admits Paragraph 4, except denies that the portions of the contract, Exhibit "A", set out in said paragraph, contain all of the material parts of said agreement relative to grievance procedure.

[fol. 43] 5. Answering Paragraph 5, and particularly the statement therein to the effect that on or about May 17, 1961 defendant discharged approximately 191 persons within the collective bargaining unit, defendant states that on or about said date the said 191 persons therein referred to, being then on strike, refused to return to the employ of defendant and thereupon ceased to be employees of defendant.

Denies that grievances, Exhibits 1-A and 2-A were duly presented to the defendant in accordance with provisions of the contract.

6. Answering Paragraph 6, defendant admits that plaintiff in the said "grievances" made the contention as alleged in said paragraph.

7. Answering Paragraph 7, defendant denies that plaintiff has complied with the grievance procedure provided by Section 33 of Exhibit "A". Defendant admits that Exhibit "D" and Exhibit "E" attached to the petition, are correct copies, and that Exhibit "G", referred to in Paragraph 7 and further in paragraph 9, is a correct copy. Defendant further denies that plaintiff has attempted or has been ready "at appropriate times" to process the grievances therein referred to.

8. Answering Paragraph 8, defendant denies that plaintiff has at any time requested arbitration of the said grievances in accordance with the provisions of Section 33 of said contract, Exhibit "A". Other statements in said paragraph are admitted except defendant denies that the action [fol. 44] of plaintiff in connection therewith has at any time been in accordance with the provisions of the contract referred to therein.

9. Denies Paragraph 9, except admits that Exhibits "B", "C" and "G", referred to therein, are correct copies.

10. Denies Paragraphs 10 and 11.

Division II

First Affirmative Defense

1. On or about May 11, 1961, plaintiff and its members struck against defendant by leaving their jobs and setting up a picket line in front of defendant's premises.

2. The said strike was contrary to the definite provisions of Paragraph 9 of its contract, Exhibit "A".

3. The said strike and picketing has been continuous since May 11, 1961.

4. The breach of contract by plaintiff has been and is now treated by defendant as terminating its obligations under said contract.

Division III

Second Affirmative Defense

1. With respect to the alleged grievance of Anton Stamoulis (Exhibit 1-A), defendant is relieved from any obli- [fol. 45] gation to process the same by reason of the fact that immediately upon announcing his discharge defendant and plaintiff proceeded to process the said alleged grievance as provided in Paragraph 33 of contract, Exhibit "A" and accomplished steps 1 and 2 of said procedure. Thereupon, the plaintiff refused to proceed further with said grievance procedure and caused a work stoppage and strike. The election of a strike constituted a waiver of any right to proceed further on said alleged grievance 1-A.

Division IV

Third Affirmative Defense

1. Respecting the alleged grievance 2-A, defendant states that the persons therein referred to, voluntarily struck in violation of the provisions of Paragraph 9 of the contract, Exhibit "A" and by their own election ceased to be employees of the defendant or to be entitled to the benefits of grievance and arbitration procedure, or any other provisions of the contract.

Division V

Fourth Affirmative Defense

1. Plaintiff and its members have waived their right to rely upon the grievance and arbitration procedure provided in Paragraph 33 of the contract, Exhibit "A", by filing [fol. 46] a complaint involving the same subject matter with the National Labor Relations Board.

Division VI

First Legal Defense

1. The petition of plaintiff fails to state a cause of action upon which the relief asked, or any relief, can be awarded for the reason that as shown by the petition, and particu-

larly Paragraph 5 thereof, it appears that the occurrences upon which the said grievances are based occurred "on or about May 17, 1961" and that as shown by Paragraphs 7 and 8 and Exhibits "B", "C", "D" and "E" of the petition, the said grievances were not presented until July 5, 1961. Paragraph 33(b) of the contract, Exhibit "A" states as follows:

> "33. (b) Any grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance, excluding the date of such occurrence, or within fourteen (14) days of the time the Union has knowledge, or should have had knowledge of such grievance, or it shall be considered completely waived."

[fol. 47]

Division VII

Second Legal Defense

1. The petition of plaintiff fails to state a cause of action upon which the relief asked, or any relief, can be awarded for the reason that as shown by said petition the arbitration agreement referred to therein was wholly executory and under the law of Iowa such agreements will not be specifically enforced.

Division VIII

Third Legal Defense

1. This Court is without jurisdiction of the plaintiff's alleged cause of action for the reason that the said action involves "unfair labor practices" under the exclusive jurisdiction of the National Labor Relations Board under the provisions of the Federal Labor Management Relations Act.

Counterclaim

By reason of the illegal strike in violation of its contract as alleged in first affirmative defense, defendant has been damaged in the sum of $150,000.00.

Wherefore, defendant prays that the petition of plaintiff be dismissed; that the Court hold that the petition does not

[fol. 48] state a cause of action upon which the relief asked, or any relief, can be granted; that defendant have judgment in the sum of $150,000.00 damage, and for costs and any other appropriate equitable relief.

IN THE DISTRICT COURT OF WOODBURY COUNTY

PLAINTIFF'S REPLY TO AFFIRMATIVE DEFENSES, REPLY TO LEGAL DEFENSES AND ANSWER AND AFFIRMATIVE DEFENSE TO COUNTERCLAIM—Filed November 9, 1961

Reply to Affirmative Defenses

Plaintiff replies to the Affirmative Defenses heretofore filed by defendant as follows:

Reply to First Affirmative Defense

1. Replying to Paragraph 1 of defendant's First Affirmative Defense, plaintiff denies that it, on or about May 11, 1961, or any other relevant time, struck against defendant or set up a picket line in front of defendant's premises, as alleged in said Paragraph 2 of defendant's First Affirmative Defense. Plaintiff admits that certain of defendant's employees within the bargaining union, represented by plaintiff, left their jobs at defendant's plant on or about May 11, 1961, but plaintiff denies that it authorized any such action by said employees. Replying further, plaintiff [fol. 49] states that said employees were compelled to leave their work by reason of the repeated and then existing prior breach of the collective bargaining agreement. Replying further, plaintiff states that any question concerning the relevance of any alleged strike to the grievances on which plaintiff seeks to compel arbitration relates the merits of the grievances; and all such questions are for determination solely by the arbitrator selected to hear and determine the grievances in accordance with the collective bargaining agreement (Exhibit "A" attached to the Complaint). Replying further, plaintiff states that no questions concerning an alleged strike have any relevance to the cause of action to compel arbitration asserted in Complaint, and no

such questions can properly be determined by this Court in this proceeding.

2. Plaintiff denies the allegation of Paragraph 2 of defendant's First Affirmative Defense. Replying further, plaintiff states that any questions concerning an alleged strike concerns the merits of the grievances and must be determined solely by the arbitrator and may not be determined by this Court in this proceeding.

3. Plaintiff denies the allegation of Paragraph 3 of defendant's First Affirmative Defense.

4. Insofar as Paragraph 4 of defendant's First Affirmative Defense attempts to allege any statement of fact or any [fol. 50] conclusions based upon fact, rather than defendant's state of mind, plaintiff denies each and every fact or conclusion set forth in said Paragraph. Replying further, plaintiff alleges that any questions concerning an alleged breach of contract by plaintiff or prior breach by defendant or the effect of any alleged breach of contract upon defendant's obligations, concern the merits of the grievances which the Complaint seeks to compel the defendant to arbitrate, and any such questions must be determined solely by the arbitrator, and may not be determined by this Court in this proceeding.

Reply to Second Affirmative Defense

1. Plaintiff admits that the grievance of Anton Stamoulis was processed through Steps 1 and 2 of the grievance procedure as provided in Section 33 of the collective bargaining agreement, but plaintiff denies each and every other allegation contained in defendant's Second Affirmative Defense. Replying further, plaintiff states that any questions concerning any alleged waiver of plaintiff's right to arbitrate said grievance concerns the merits of the grievance and any such questions must be determined solely by the arbitrator and may not be determined by this Court in this proceeding.

[fol. 51]

Reply to Third Affirmative Defense

1. Plaintiff denies each and every allegation contained in defendant's Third Affirmative Defense. Replying further, plaintiff states that any questions concerning an alleged strike by persons listed on Grievance 2-A and the effect of such an alleged strike concern the merits of said grievance, and any such questions are for determination solely by the arbitrator and not by this Court.

Reply to Fourth Affirmative Defense

1. Plaintiff admits that a charge complaining of violation by defendant of the National Labor Relations Act, as amended, was filed with the National Labor Relations Board, but plaintiff denies that the filing of such charge waived any right under the collective bargaining agreement or that such charge has any relevance to the plaintiff's cause of action to compel defendant to arbitrate grievances as set forth in the Complaint.

Reply to Legal Defenses

Plaintiff replies to the Legal Defenses heretofore filed by defendant as follows:

Reply to First Legal Defense

1. Plaintiff denies that the provisions of Paragraph [fol. 52] 33(b) of the collective bargaining Agreement bar the relief requested and denies the plaintiff had failed in any manner to comply with the provisions of said paragraph, as alleged in defendant's First Legal Defense.

2. Replying further, plaintiff states that Paragraph 33 (b) of the collective bargaining agreement, set out in defendant's First Legal Defense, provides that grievances must be presented within fourteen (14) days of the occurrence " . . . or within fourteen (14) days of the time the Union has knowledge, or should have had knowledge of such grievance. . . . " Grievance No. 1-A (Exhibit "B" attached to the Complaint) was presented within fourteen

(14) days of the occurrence giving rise to said grievance, as defendant admits in its Second Affirmative Defense hereto filed. The presentation of said grievance on July 5, 1961, as alleged by defendant, constituted compliance by plaintiff with Step 3 of the grievance procedure (Paragraph 33(c)(3) of Exhibit "A" of the Complaint), which is the first step at which the grievance is required to be put in writing. No time limitation upon the presentation of grievances in writing at the third step is contained anywhere in the collective bargaining agreement.

3. Replying further, plaintiff states that it first acquired knowledge of the discharges forming the subject of Grievance No. 2-A (Exhibit "C" of the Complaint) on June 26, 1961, and that the filing of said grievance within fourteen [fol. 53] (14) days after such date, on July 5, 1961, constituted full compliance with the provisions of Paragraph 33 (b) of the agreement.

4. Replying further, plaintiff alleges that questions concerning the compliance with the provisions of Paragraph 33(b) of the agreement must be determined solely by the arbitrator and may not be determined by this Court.

Replying to Second Legal Defense

1. Replying to defendant's Second Legal Defense, plaintiff states that its complaint states a claim for relief under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a), for the violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in said Act.

2. The law to be applied in a suit under said Section 301(a) is federal law only.

3. Agreements to arbitrate contained in collective bargaining agreements are, by virtue of Section 301(a) and the federal law applied thereunder, specifically enforceable irrespective of whether or not such agreements are executory.

4. By reason of the enactment by Congress of Section 301(a), Federal law has pre-empted the field of suits for violation of contracts between an employer and a labor organization representing employees in an industry affect- [fol. 54] ing commerce and State law not applicable in such suits.

5. By reason of the foregoing, any provisions or principles of the law of Iowa relating to the enforcement of executory agreements to arbitrate, having been superseded by Federal law to the contrary, are totally irrelevant to the claim for relief stated in the Complaint.

Reply to Third Legal Defense

1. Replying to defendant's Third Legal Defense, plaintiff states that the Complaint states a claim for relief under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. 185(a), for violation of contract by defendant. Section 301(a) specifically provides for suits for the violation of contracts, and has jurisdiction over such an action whether or not the activities of which Complaint is made constitute unfair labor practice under other, separate provisions of the Federal Statute. Further, plaintiff denies that the Complaint charges or complains of an unfair labor practice within the meaning of the Federal Statute.

Answer to Counterclaim

Plaintiff answers the counterclaim asserted herein by defendant as follows:

1. Plaintiff denies each and every allegation contained in [fol. 55] defendant's counterclaim and states that said counterclaim failed to state a claim for relief.

2. Said counterclaim failed to state a claim for relief by reason of the absence of allegations therein setting forth the nature of the claim.

3. Insofar as the reference in said counterclaim to allegations contained in defendant's First Legal Defense may require answer, plaintiff realleges its reply to said First Affirmative Defense, denying defendant's allegations contained therein.

Affirmative Defense to Counterclaim

1. Plaintiff states that no strike or picketing at defendant's plant was caused, authorized or sanctioned by it on or about May 11, 1961 or at any other relevant time. While certain of defendant's employees within the bargaining unit represented by plaintiff left their jobs at defendant's plant on or about May 11, 1961, said employees were compelled to leave their jobs by reason of defendant's repeated and continuous assignment of supervisory personnel to perform production work in the plant.

2. Said acts of defendant constituted direct violation of the collective bargaining agreement and amounted to a repudiation of said agreement by defendant.

3. By reason of the prior breaches and repudiation of [fol. 56] the collective bargaining agreement by defendant, defendant's employees' failure to work was not in violation of the collective bargaining agreement and said employees were excused from compliance with Section 9 thereof.

Wherefore, plaintiff prays for relief in accordance with the prayer of plaintiff's Petition and that the Counterclaim of defendant be dismissed.

In the District Court of Woodbury County

Amendment to Petition—Filed November 10, 1961

Leave of Court having been first obtained, Plaintiff amends his Petition as follows, to wit:

1. By deleting Paragraph 5 thereof and inserting therein the following new Paragraph 5; on or about May 11, 1961, the Defendant discharged employee Anton Stamoulis. A grievance protesting said discharge was thereupon duly presented to defendant and process through Steps 1 and 2 of the grievance procedure in accordance with Section 33 of the collective bargaining agreement (page 13 of Exhibit "A" attached hereto). Said grievance, requesting reinstatement of employee Anton Stamoulis to his position with full seniority rights and pay for time lost as a result [fol. 57] of his improper discharge, was thereafter reduced

to writing, designated as Grievance No. 1-A, and presented to defendant on or about July 5, 1961, in accordance with Section 33 of the collective bargaining agreement. A copy of said grievance is attached hereto as Exhibit "B" and incorporated herein by reference. On or about June 26, 1961, Defendant discharged the remaining approximately one hundred ninety (190) persons employed in positions within the collective bargaining agreement, and plaintiff first acquired knowledge of such discharges on or about such date. A grievance, requesting reinstatement and other relief for said employees, was duly presented to defendant. A copy of said grievance as reduced to writing and presented to defendant, designated as Grievance No. 2-A, is attached hereto as Exhibit "C" and incorporated herein by reference.

2. By deleting from Paragraph 6 thereof the following words, "on or about May 17, 1961" which words are found in the third line of the said paragraph.

Wherefore, plaintiff repeats the prayer of his original Petition.

[fol. 58]

IN THE DISTRICT COURT OF WOODBURY COUNTY

ANSWER TO PLAINTIFF'S AMENDMENT TO PETITION
—Filed November 14, 1961

Comes Now, defendant and for answer to plaintiff's amendment to petition, states:

1. Answering Paragraph 1 of said amendment, which is substituted for Paragraph 5 of the original Petition, defendant states:

As to the grievance (Exhibit "B" of plaintiff's Petition) relative to the alleged grievance of Anton Stamoulis, the said Stamoulis on the said May 11, 1961 left the defendant's premises and refused to proceed further with the grievance by putting the same in writing as provided by Section 33 (c)(3) and waived any further right to process the said grievance.

2. Answering the said amendment as to the alleged grievance of the 190 persons, shown on Exhibit "C" of plaintiff's Petition, defendant denies that it discharged the said persons on June 26, 1961, as alleged in said amendment, and alleges that on May 11, 1961 the said 190 persons and the said Anton Stamoulis left their jobs and the premises of defendant after being each notified that said action was a breach of contract. Defendant alleges further that on the 12th day of May, 1961, defendant addressed a letter to each of the 191 employees inviting them to return to work immediately and advising them that their leaving was in breach of contract and that if they did not immediately [fol. 59] return, their jobs would be filled by permanent replacements. The said letter further advised said employees that their alleged cause of leaving the work, to wit: the discharge of Anton Stamoulis, would be processed as a grievance under the terms of Section 33 of the contract Exhibit "A". Thereupon and on or about May 15, 1961, at a formal called meeting of plaintiff Union, plaintiff and its members unanimously rejected the offer of defendant that they return to work and that the Stamoulis matter be handled as a grievance, and the said plaintiff advised defendant on or about May 15, 1961 of their rejection. Defendant thereupon treated the rejection of its offer as a termination of the employment of each and all of the said 191 employees. Defendant specifically denies that it took any action on or about June 26, 1961 to discharge the said employees and alleges that they ceased to be employees upon such voluntary unanimous rejection on May 15, 1961 of defendant's offer to return to their employment and to process their alleged grievance.

[fol. 60]

APPLICATION TO THE COURT SEPARATELY TO HEAR AND DETERMINE POINTS OF LAW RAISED IN THE PLEADINGS UNDER R.C.P. 105—Filed January 10, 1962

Comes Now, defendant and applies to the Court under R. C. P. 105 to separately hear and determine points of law raised in the pleadings. The Court is asked to rule that:

1. Plaintiff is not entitled to the relief asked in this case for the reason that under Iowa law and procedure this

Court cannot specifically enforce an executory agreement to arbitrate.

2. Plaintiff is not entitled to the relief asked for the reason that it appears by the pleadings herein that any right to enforce the grievance and arbitration provisions of the contract between the parties, has been waived by plaintiff by

(1) Bringing an action before the NLRB to enforce its claimed rights; and

(2) Engaging in a "walkout" in violation of the contract, instead of relying on the agreement to arbitrate.

3. Plaintiff is not entitled to the relief asked for the reason that notice of grievance was served too late and under the contract, the right has expired.

IN THE DISTRICT COURT OF WOODBURY COUNTY

[fol. 61] That after oral hearing and submission of Briefs at Court on February 13, 1962, Judge George M. Paradise made the following ruling upon Defendant's Application to Hear and Determine Points of Law raised in the Pleadings under Rule 105, Rules of Civil Procedure:

RULING—February 13, 1962

The plaintiff commenced this case against the defendant and in its prayer for relief prayed that the Court enter an order enjoining defendants from failing and refusing to arbitrate certain grievances claimed by plaintiff and asking specific performance by defendant of an agreement to arbitrate contained in a collective bargaining contract between plaintiff and defendant, copy of which contract is set out in the plaintiff's petition.

Defendant has answered, admitting the contract and denying that plaintiff has complied with the grievance procedure set out in said contract and has alleged affirmatively that plaintiff and the employees represented by plaintiff in violation of their agreement to arbitrate grievances left

their jobs and set up a picket line in front of defendant's premises and that said strike is continuous. Defendant further pleads affirmatively that the strike was contrary to the provisions of Section 9 of the contract providing that,

> "... the employees shall not engage in and the Union [fol. 62] shall not call or sanction any slow down, work stoppage or strike ..."

and that by engaging in said "slow down, work stoppage or strike" plaintiff had waived the provisions of Section 33 of said contract providing for grievance procedure and binding arbitration of any dispute

> "between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract ..."

Defendant in its answer further alleges that the right to arbitrate had been waived by the filing by plaintiff of an unfair labor practice charge against defendant with the National Labor Relations Board involving the matter in dispute between the parties.

Defendant further alleged that the application for specific performance of the arbitration provision in the contract came too late and was waived by the provision in the contract, Section 33(b),

> "Any grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance ... or it shall be considered completely waived."

Plaintiff filed reply in which it is admitted that the em- [fol. 63] ployees represented by the plaintiff

> "Left their jobs at defendant's plant on or about May 11, 1961."

Plaintiff's reply further admits that it filed a charge complaining of violation by defendant with the National Labor Relations Board.

By amendment, plaintiff amended its answer, striking Paragraph 5 thereof wherein it was alleged that defendant

discharged 191 persons on or about May 17, 1961, and striking from Paragraph 6 of the petition the date May 17, 1961 and substituting therefor an allegation that the said discharges occurred on June 26, 1961.

In ruling upon an application to determine points of law raised by the pleadings, the Court can consider only matters alleged as facts by the plaintiff or alleged by defendant and not denied by plaintiff. Matters on which there is a dispute as to the facts and on which evidence is necessary, cannot be determined by the Court on rulings on points of law. It is apparent to the Court that plaintiff and defendant had entered into a collective bargaining agreement, copy of which is set out as Exhibit "A" attached to plaintiff's petition, and that such contract provided, in Sections 9 and 33 thereof, that the parties would not engage in or sanction any slow down, work stoppage or strike and no [fol. 64] lockout during the period of the agreement. As quid pro quo therefor, the contract provides in Section 33 thereof a complete provision for "adjustment of grievances" by setting up a procedure for adjusting and handling any dispute between the parties with reference to the proper interpretation or application of the contract. Said procedure consists of a five-step process for handling grievances, terminating in binding arbitration. In other words, the contract was obviously intended to provide a peaceful method for settling any and all disputes between the parties relative to interpretation or application of any of the provisions of the contract and to render unnecessary or improper on the part of either party of a resort to economic pressure, such as a slow down, walkout or lockout. It is apparent from the pleadings and facts therein alleged, or not denied, that a dispute between the parties relative to the "interpretation or application" of the provisions of the contract did arise and that the employees represented by plaintiff did engage in a walkout and did file charges of unfair labor practice with the National Labor Relations Board. With the merits of the controversy, this Court is not at this time concerned.

Law Points Raised by Defendant

Defendant has made application to the Court to rule as a matter of law that:

1. Plaintiff is not entitled to specific performance of [fol. 65] the agreement to arbitrate the dispute for the reason that the agreement is at this time executory and that under Iowa law and procedure an executory agreement to arbitrate will not be specifically enforced.

2. Plaintiff is not entitled to specific enforcement of the arbitration provision in the contract by reason of having waived such agreement by engaging in a slow down or walkout contrary to the provisions of its contract and by reason of having filed unfair labor practice charges regarding the dispute with the National Labor Relations Board. Defendant claims that plaintiff has made an election of remedies and cannot thereafter resort to arbitration.

3. Defendant claims that the application for arbitration by plaintiff comes too late since the petition of plaintiff claims that the discharges occurred on May 17, 1961 and the grievance applications, attached to the petition as Exhibits "B" and "C", show that they were presented July 5, 1961 and more than fourteen (14) days after the "Occurrence giving rise to such grievance" as provided by Section 33(b) of the contract.

The Court heard oral arguments of the parties on the question of ruling on law points and the parties filed written briefs which have been carefully considered by the Court, and the Court now makes the following:

[fol. 66] Ruling on Law Points

Law Point Three

Following the filing by defendant of its application to rule on law points, plaintiff amended its petition so as to allege that the discharges complained of occurred June 26, 1961 instead of May 17, 1961 and, therefore, within fourteen (14) days of such occurrence.

Since the Court can rule as a matter of law only upon facts stated or admitted in the pleadings, it must be taken

as true for the purpose of this ruling that the occurrence complained of occurred within the said fourteen (14) day period, and, therefore, the third point raised by defendant is not sustained and the Court finds and rules as a matter of law that the notices of grievance were not served too late under the terms of the contract.

Ruling on Law Point One Raised by Defendant

Defendant contends in Law Point One that the plaintiff is not entitled to the relief asked, for the reason that under the law and precedence binding upon an Iowa Court specific performance of an executory agreement to arbitrate cannot be granted.

It is apparently conceded by both parties, and the research by the Court makes it clear, that the rule at common [fol. 67] law, and in a large majority of the States, was and is that an executory agreement to arbitrate will not be specifically enforced. As stated in 3 Am. Jur. "Arbitration and Award" Section 31,

> "It is settled at common law that a general agreement, in or collateral to a contract, to submit to final determination by arbitrators the rights and liabilities of the parties with respect to any and all disputes that may thereafter arise under the contract is voidable at will by either party at any time before a valid award is made, and will not be enforced by the courts."

The same rule is announced by 6 C.J.S. "Arbitration and Award" Section 33 and by the following Iowa cases:

Oskaloosa Sav. Bank v. Mahaska Bank, 205 Iowa 1351, 219 N. W. 530, 60 A. L. R. 1204

Read v. State Ins. Co., 103 Ia. 307, 72 N. W. 665

Donald v. C. B. & Q. Ry. Co., 93 Ia. 284, 61 N. W. 971

Ames Canning Co. v. Dexter Seed Co., 195 Ia. 1285, 190 N. W. 167

In the Ames case, supra, the Iowa Supreme Court said,

> [fol. 68] "The right of a party to a mere naked agreement for submission of a controversy to arbitration, to revoke it at any time before decision has been reached or an award made is recognized by the weight of authority."

It is contended, however, by the plaintiff that Section 301(a) of the Labor Management Relations Act, providing for enforcement of labor contracts in Federal Court, has changed the common law rule and that the Federal law is now binding on State Courts.

Section 301(a) Labor Management Relations Act is as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
>
> (1947 Taft-Hartley Amendment).

This statute was interpreted by the United States Supreme Court in 1956, Textile Workers v. Lincoln Mills, [fol. 69] (353 U. S. 448, 32 L. C. 70, 733), as authorizing the Federal Court to specifically enforce an arbitration agreement. It is noted that nothing in this statute refers to State Courts or purports to be binding in the case of State procedure.

It must conceded that there is a conflict of authority on the question of whether or not Section 301(a) Labor Management Relations Act, as interpreted in the Lincoln Mills case is binding upon State Courts. Both State and Federal Courts are in conflict on the matter. So far as this Court is able to determine the matter has not been authoritatively passed upon by the United States Supreme Court, and, therefore, this Court deems itself bound to follow Iowa precedence and holds as a matter of law that plaintiff is

not entitled to specific performance of the agreement to arbitrate disputes.

Ruling on Law Point Two Raised by Defendant

Defendant's second point of law is that plaintiff has waived its right to arbitrate by

1. Indulging in a walkout and picketing in violation of the terms of its contract; and

2. By filing an unfair labor practice charge with the National Labor Relations Board concerning the dispute in question.

Defendant contends that there has been an election of remedies and plaintiff cannot, after having agreed not to strike and to arbitrate differences, pursue a remedy incon- [fol. 70] sistent with arbitration, and to do so is to forfeit and waive such right.

It is abundantly apparent to the Court that by the terms of the contract between the parties, it was intended that a dispute such as occurred in this case would be settled by the grievance and arbitration procedure set out in the contract. It is equally clear that the plaintiff and its members chose to disregard the arbitration provision and engaged in a walkout. Even though it is alleged that the Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts. Plaintiff argues that there was no waiver for the reason that the question of whether or not the action taken by the employees was right or wrong is a matter that should be determined by arbitration since it involves the interpretation and application of the contract. Plaintiff argues that the arbitrator and not the Court sh 'd determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined.

[fol. 71] This Court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitutes a waiver and election of remedies. Having elected, the parties may not thereafter resort to the remedy which they have waived.

In this case the law seems to be abundantly clear.

A very good case which states the doctrine clearly is Cuneo Press v. Kokomo Paper Handlers (U.S.C.A. 7th (1956) 30 L.C. No. 70,084, 235 F. 2d, 108, Cert. Den. 352 U.S. 912). The Union and the employer had a contract providing for arbitration and agreeing that there would be no strike or lockout. The Union staged a sitdown or wildcat strike. The employer brought an action in Court for breach of contract and the Union filed a motion to stay pending arbitration. In denying the motion, the Court said:

> "Even if the unions originally had an issue referable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength. Having thus violated their contract to plaintiff's damage, it was too late for them to demand arbitration on this issue."

[fol. 72] The Cuneo case has been followed and cited repeatedly. In the year 1960 the Cuneo case was relied upon by Portland Web Pressmen's Union v. Oregonian Pub. Co. 188 Fed. Sup. 859, Aff. (on another ground), 286 Fed. 2d, 4, Cert. Den., 366 U.S. 912.

Another case is Western Express Co. v. Brotherhood of Railroad Trainmen (NY Sup. Ct. App. Div. (1950) 18 L.C. No. 65,980). In this case the question was whether a party to an agreement to arbitrate may obtain a Court order compelling arbitration after the party has taken action which amounts to an abandonment of the agreement to arbitrate, and it was the employer who had taken such inconsistent action by filing with the National Labor Relations Board. The Court said:

"Where an employer files with the NLRB against a union unfair practice charges involving the same dispute as is the subject of an arbitration proceeding, such action amounts to an abandonment of the agreement between the employer and the union to arbitrate that subject. The employer is not thereafter entitled to compel the union to arbitrate on the subject."

Many other cases are cited in the above cases.

On the question of election of remedies, a recent U. S. Supreme Court opinion in 1959 has also been relied upon, [fol. 73] Union Pacific Ry. v. Price, (1959) 360 U.S. 601, 37 L.C. No. 65,559.

I have found no cases contrary to the authorities above cited. The cases cited by plaintiff seem to rely entirely upon the question of whether or not the remedy *elected* by the party at fault was or was not subject to arbitration. This Court is satisfied that where parties have agreed to settle by arbitration and have failed to proceed to arbitrate in the manner or at the time agreed upon, but have, instead, chosen to rely upon their economic strength and have elected a remedy which they agreed they would not pursue, they cannot thereafter go back and demand the remedy which they have waived.

It Is Therefore the finding and ruling of the Court that it appears as a matter of law that plaintiff has waived its right to arbitration in this case by electing the walkout or strike and by filing an unfair labor practice claim with the National Labor Relations Board.

The ruling of the Court sustaining defendant's contention in its application for ruling on law points hereinabove stated, constitutes a final order on the points so ruled upon. Since the ruling does not dispose of the whole case, however, it is interlocutory for the purposes of appeal.

[fol. 74]

IN THE DISTRICT COURT OF WOODBURY COUNTY

APPLICATION TO SUPREME COURT OF THE STATE OF IOWA FOR ORDER GRANTING APPEAL IN ADVANCE OF FINAL JUDGMENT

Thereafter plaintiff-appellant made application to the Supreme Court of the State of Iowa for an order granting an appeal in advance of final judgment stating to the Court as follows:

1. That defendant is engaged in the meat packing industry in Sioux City, Iowa.

2. That plaintiff is a local labor union which represents the production employees of defendant; that the members of plaintiff are all of the production employees of defendant who were actively engaged in work for the defendant at its plant prior to May 11, 1961.

3. That plaintiff and defendant are parties to a collective bargaining agreement covering terms and conditions of employment of the employees; that said agreement was executed on October 1, 1960, and provided that it would remain in effect until October 1, 1961, and from year to year thereafter unless terminated by the serving of notice by either party at least 60 days prior to October 1, 1961, or October 1 of any year thereafter.

4. That the petition of plaintiff, as amended, alleges that defendant discharged one employee (Anton Stamoulis) on May 11, 1961, and discharged the remaining approximately 190 employees employed in positions within the unit covered by the collective bargaining agreement on or about June 26, 1961.

5. That the original dispute which resulted in the discharge of Mr. Stamoulis as alleged in plaintiff's reply, [fol. 75] arose out of the defendant's assignment of supervisory personnel to perform work of the production unit employees in violation of the collective bargaining agreement.

6. That the collective bargaining agreement, as alleged in the Petition, contains in Section 33 a specific procedure

for the settlement of disputes between the plaintiff and defendant and provides for ultimate determination of any dispute with reference to the "proper interpretation or application" of the provisions of the contract by an impartial arbitrator, following the filing of a grievance by plaintiff with the defendant.

7. That the Petition of plaintiff further alleges that the grievances were duly filed with defendant, one on behalf of Anton Stamoulis and the other for the remaining 190 employees discharged on or about June 26, 1961; that both grievances alleged improper discharges not based on good cause as provided by the contract between the parties; that defendant has consistently refused to submit the grievance to arbitration, as required under the contract, despite repeated requests by plaintiff to do so.

8. That the Petition was filed in the District Court seeking an Order of Court directing defendant to proceed to arbitration of the grievances in accordance with the collective bargaining agreement; that no request was made of the Court to make any determination concerning the merits of the grievances.

[fol. 76] 9. That subsequently defendant filed various pleadings which included certain alleged legal defenses to plaintiff's petition; and that under R. C. P. 105 the defendant subsequently asked for a ruling on law points on its following three contentions:

(a) That the Court cannot under Iowa law and procedure specifically enforce an executory agreement to arbitrate.

(b) That the plaintiff has waived its right to enforce the arbitration provision of the agreement by bringing an action before the National Labor Relations Board and by allegedly engaging in a walk-out in violation of the agreement.

(c) That the Notice of Grievances was allegedly served too late.

10. That a final unfavorable ruling to plaintiff on any of these law points effectively defeated plaintiff's petition;

that the Court on February 13, 1962, made adverse rulings to plaintiff on two of these points holding in conclusion on these two points as follows:

(a) "It must be conceded that there is a conflict of authority on the question of whether or not Section 301(a) Labor Management Relations Act, as interpreted in the Lincoln Mills case is binding upon State Courts. Both State and Federal Courts are in conflict on this matter. So far as this Court is able to determine the matter has not been authoritatively passed upon by the United States Supreme Court, and, therefore, this Court deems itself [fol. 77] bound to follow Iowa precedence and holds as a matter of law that plaintiff is not entitled to specific performance of the agreement to arbitrate disputes."

(b) "IT IS THEREFORE the finding and ruling of the Court that it appears as a matter of law that plaintiff has waived its right to arbitration in this case by electing the walkout or strike and by filing an unfair labor practice claim with the National Labor Relations Board."

11. That the Court recognized the finality of its orders to the cause of plaintiff by concluding its opinion as follows: "The ruling of the Court sustaining defendant's contention in its application for a ruling on law points hereinabove stated, constitutes a final order on the points so ruled upon. Since the ruling does not dispose of the whole case, however, it is interlocutory for the purpose of appeal."

12. That the only matter remaining not acted upon under the Court's rulings is an alleged counterclaim of defendant for damages; that the testimony to establish the facts of plaintiff's petition is voluminous and would require a lengthy Court hearing all of which would be for no purpose if the Court's rulings herein are in fact correct.

13. That the rulings of the Court adverse to plaintiff on the law points involve substantial rights in this cause and will materially affect the final decision, and a determination of the correctness of said rulings before trial on the merits [fol. 78] will better serve the interests of justice.

14. That the plaintiff specifically contends that recent U.S. Supreme Court decisions directly conflict with the rulings of the Court herein of which plaintiff complains and that an appeal in advance of final judgment on these rulings will in fact expedite the trial of this matter.

Wherefore, the plaintiff respectfully prays that the Court grant the Appeal and enter an Order, setting this application for hearing before the Court, or a Justice thereof and prescribe the Notice to be given of the date and place of said hearing and for an Order staying all proceedings in the District Court of Iowa, in and for Woodbury County, Iowa, pending the hearing on this Application and the rulings and orders to be made and entered herein and, also make all such Orders as may be appropriate and necessary as will preserve their rights.

IN THE SUPREME COURT OF THE STATE OF IOWA

ORDER—March 5, 1962

Application granted. Appeal Allowed.

[fol. 79]

IN THE DISTRICT COURT OF WOODBURY COUNTY

To: The Clerk of the District Court of Woodbury County, Iowa.

NOTICE OF APPEAL—Filed March 7, 1962

You are hereby notified that the plaintiff in this case hereby appeals to the Supreme Court of Iowa from the final judgment and decision on law points in this cause entered on the 13th day of February, 1962 and from the final order and decree herein and from all interlocutory rulings and decisions adverse to appellant.

[fol. 80]

IN THE SUPREME COURT OF THE STATE OF IOWA

164 50664

LOCAL UNION NO. 721, UNITED PACKINGHOUSE FOOD AND ALLIED WORKERS, AFL-CIO, Appellant,

v.

NEEDHAM PACKING COMPANY, INC., d/b/a SIOUX CITY DRESSED BEEF, a Corporation, Appellee.

Appeal from Woodbury District Court. George M. Paradise, Judge.

Appeal from order on points of Law under Rule 105, R.C.P., as to force and effect of a no-strike clause in a collective bargaining agreement. Affirmed and Remanded.

Harry H. Smith, Sioux City, Iowa.
Colton, Fruchtman & Watt, Chicago, Ill.
For Appellant.

Shull, Marshall, Mayne, Marks & Vizintos, Sioux City, Iowa.
James A. Gilker, Fort Smith, Arkansas,
For Appellees.

[fol. 81]

OPINION—Filed January 15, 1963

HAYS, J.

Plaintiff, as bargaining agent for employees of the defendant, and defendant entered into a collective bargaining agreement which contained the following provision, being paragraph 33-C(5) thereof, "In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be

referred to a board of arbitration *upon the request of the Union.* * * * Said Arbitration Board shall have authority only to interpret and apply the provisions of this contract. Its award * * * shall be binding upon the Company and the Union and upon the employees involved" (Italics added). The agreement, paragraph 9, provided: "It is agreed that during the period of this agreement the employees shall not engage in and the Union shall not call or sanction any slow down, work stoppage or strike, and no lock out shall be inaugurated (sic) by the Company".

This equitable action brought by the Union seeks to specifically enforce arbitration by the Company of certain grievances filed by the Union and which the Company refuses to arbitrate. Generally, the facts as set forth in the pleadings are,—In May 1961, the Company discharged an employee, such discharge being arbitral as to whether it was for just cause, as authorized by paragraph 8(a) of the bargaining agreement. Following such discharge, 190 employees left their jobs and have refused to return until the question of just cause for the discharge of the one employee has been adjusted. The Company contends that by walking out the employees breached Par. 9 of the bargaining agreement and that the same is no longer in force [fol. 82] and effect. It is not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto. Also, by counterclaim the Company asks substantial damages on account of the walkout. The Company made application to the Court to rule upon three points of law, as provided for under Rule 105, R.C.P., to-wit: (1) Plaintiff not entitled to relief since Iowa law denies specific endorsement of an executory agreement to arbitrate. (2) Plaintiff not entitled to relief since it has waived the right to enforce arbitration provision, by the walkout and by filing complaint before the NLRB to enforce its claim. (3) No grievance filed within time required by agreement and the right to arbitrate has expired. The trial court sustained defendant's contention as stated in No. (1) and (2) above and rejected No. 3, leaving for further determination the damage issue presented by the counterclaim. Plaintiff was granted permission to appeal under Rule 332 R.C.P.

I. Error No. 1, is to the effect that the issues raised in the case must be determined under federal law, not the state. It is conceded that the questions here come within the purview of Section 301(a) 29 U.S.C. Sec. 185(a) which provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." The United States Supreme Court, while holding that State Courts may hear and determine controversies coming under Section 301(a), held that in so doing they must apply and follow the federal law. Dowd Box Co., v. Courtney, 368 U.S. 502, 82 S. Ct. ....., 7 L. Ed. 2d 483. [fol. 83] In the leading case of Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 455, 77 S. Ct. 923, 1 L. ed. 2d 972, the Court said "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation (Section 301) does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way". (Italics ours). See also, Teamsters Chauffeurs, Warehousemen & Helpers, v. Lucas Flour Co., 369 U.S. 95, 7 L. ed. 2d 593, 82 S. Ct. 571; Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L. ed. 2d 462, 82 S. Ct. ..... Appellee concedes in argument that Federal law must be applied so we need spend no further time on this assigned error except to say that under Federal law, agreements to arbitrate may be specifically enforced. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L. ed. 2d, 1409, 80 S. Ct. 1347; United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 4 L. ed. 2d 1424, 80 S.C. 1358.

II. Error is claimed on the Court's ruling that right to arbitration was waived by the walkout. The appellant cites

and relies upon the three steelworker cases, last above cited. In those cases arbitration was ordered but in none of them was the breach of a no strike clause involved as it is in the instant case. We do not find that the exact question before us has been determined, however there are cases dealing with the no strike clause. Atkinson v. Sinclair [fol. 84] Refining case, supra, is an action by the Refining Co., to recover damages for a breach of a no-strike clause in a bargaining agreement. Defendant moved to stay proceedings pending arbitration. The stay was denied, the court saying the agreement expressly provides that arbitration may be invoked only at the option of the Union. At no place in the contract does the Union agree to arbitrate at the behest of the Company. The Company is to take its claim elsewhere, which it has now done. In Drake Bakeries v. Local 50, American Bakery & Confectionery Workers International AFL-CIO, 370 U.S. 254, 8 L. ed. 2d 474, 82 S. Ct. ....., decided the same date as the Sinclair Case, supra, the court ordered a stay of action for damages on account of a breach of a no-strike clause pending arbitration. It bases its holding upon the all inclusive provision in the agreement to arbitrate, saying that the arbitration agreement "obligated the Company to arbitrate its claim for damages from forbidden strikes by the Union".

While in the Bakeries Case, the Company contended, under the "quid pro quo" rule, (See Lincoln Case supra) there was a waiver of right to arbitrate the court states no such action was taken by the Company and no decision was made thereto. In the instant case we are squarely faced with issue of a waiver of right to arbitrate because of breach of no-strike clause.

In the Warrior & Gulf case, supra, the court said, page 583 of 363 U.S. "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no strike clause is included in the agreement, then in a very real sense anything that management does is subject to the agreement * * * ". Whether the "quid pro quo" rule will be followed to the [fol. 85] extent of declaring a breach of a no-strike clause

constitutes a waiver of rights to arbitrate under the agreement, depends upon the view to be taken of Section 301(a), supra. Clearly, under said rule work stoppage by strikes, etc., is not conducive to economic tranquility and progress. If the view is taken that a strike is merely another incident or grievance which should be decided as are other contract violations, it would seem the Company has relinquished many valuable rights and received nothing in return and arbitration agreements will be shied away from. In fact the purpose of Section 301(a) will be entirely emasculated. If, on the other hand, the view is taken that a no-strike clause means what it says and that if the Union has the right to require arbitration of differences arising between it and the Company then the Company has a similar right to have the Union abide by its agreement we are well along the road to labor and management tranquility. It "should not have its cake and eat it too". We think the "quid pro quo" view advanced in the Lincoln case, supra, is the sound and sensible rule to adopt. This is the view in effect taken by the trial court and though Iowa laws were being applied, we see no conflict with the federal laws and think that actually it was federal law that was used. We think the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout.

Two other matters are urged but we find no merit therein and make no comment thereon.

The order of the trial court is affirmed and cause remanded for further proceedings pending therein.

Affirmed and Remanded.

Garfield, C.J., Larson, Thompson, Peterson, Snell and Moore, JJ., concur.

Thornton, J., dissents.

Stuart, J., takes no part.

[fol. 86] THORNTON, J. (dissenting).

I respectfully dissent. The pleadings in this case should not be construed to hold that a violation of the no-strike clause is admitted or stands undenied. The question is not ready for decision under rule 105, Rules of Civil Procedure.

Further, the parties have agreed on a tribunal for the determination of questions arising, "with reference to the proper interpretation or application of the provisions of this contract." This provision is not a narrow one. It includes the no-strike clause. The fact that arbitration may be instigated only at the request of the union should not be determinative. The company has so agreed. Whether or not there has been a violation of the no-strike clause is proper for the arbitrators to consider in determining the grievance. A waiver would go to the merits of that question.

What I believe to be the error in the majority opinion is holding that once an evidence of a violation of a no-strike clause appears the parties are no longer required to arbitrate. Under the broad provision for arbitration violations by both parties must be considered by the arbitrators.

Under the provisions of this contract where the union has requested arbitration in accordance with the contract that proceedings should be compelled. The company is denied no rights. It has agreed to be bound by the award of the arbitrators. If after that proceedings is complete it has a damage claim it may proceed in the courts. That is no concern of ours at this time. I would reverse.

[fol. 87] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF IOWA

No. 50664

Appeal from Woodbury District Court

LOCAL UNION No. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, Appellant,

vs.

NEEDHAM PACKING COMPANY, INC., d/b/a SIOUX CITY DRESSED BEEF, a corporation, Appellee.

ORDER STAYING ISSUANCE OF PROCEDENDO, ETC.—
Filed February 21, 1963

Upon presentation of Appellant's application to stay issuance of procedendo to the Woodbury District Court pending Appellant's filing a Petition for Certiorari in the Supreme Court of the United States, It Is Ordered that issuance of procedendo be stayed until May 1, 1963, provided that if the Supreme Court of the United States shall deny Certiorari prior to the aforesaid date, procedendo shall issue forthwith.

It Is Further Ordered, that all proceedings herein in the Woodbury District Court be stayed until such time as this Court may issue procedendo.

T. G. Garfield, Chief Justice, Supreme Court of Iowa.

[fol. 88] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 89]

SUPREME COURT OF THE UNITED STATES

No. 996, October Term, 1962

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, Petitioner,

vs.

NEEDHAM PACKING COMPANY, INC., d/b/a SIOUX CITY DRESSED BEEF.

ORDER ALLOWING CERTIORARI—June 17, 1963

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted]102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY, D/B/A SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, FRUCHTMAN & WATT,
105 West Adams Street,
Chicago 3, Illinois,

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa,
Of Counsel.

THE GOTTSDIEN-GRAHAM PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix (Opinion of Supreme Court of Iowa)	11

List of Authorities Cited.

Dowd Box Co. v. Courtney, 368 U. S. 502 (1962) 10

Drake Bakeries v. Local 50, American Bakery and Confectionery Workers, 370 U. S. 254 (1962) 6, 8, 9

International Moulders and Foundry Workers Union, Local 239 v. Susquehanna Casting Co., 283 F. 2d 80 (C. A. 3d 1960) 7

Local 748, Int'l Union of Electrical, Radio and Machine Workers v. Jefferson City Cabinet Co., 313 F. 2d ..., 46 CCH Lab. Cases ¶ 18,100 (C. A. 6th 1963) 7

Lodge No. 12, Int'l Ass'n of Machinists v. Cameron Iron Works, 257 F. 2d 467 (C. A. 5th 1958), cert. den. 358 U. S. 880 (1958) 8

Textile Workers Union v. Lincoln Mills of Alabama, 353 U. S. 448 (1957) 7, 8, 9

United Steelworkers of America v. American Mfg. Co., 363 U. S. 564 (1960) 6, 9

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U. S. 593 (1960) 6

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574 (1960) 6

United Textile Workers of America, AFL-CIO, Local 120 v. Newberry Mills, Inc., ____ F. 2d ____, 47 CCH Lab. Cases ¶ 18,157 (C. A. 4th 1963) 7

Statute.

Section 301 (a), Labor-Management Relations Act of 1947, 29 U. S. C. § 185 (a) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. _____

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

NEEDHAM PACKING COMPANY, D/B/A SIOUX CITY DRESSED BEEF, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

Petitioner, Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Iowa, entered in the above-entitled cause on January 15, 1963.

CITATION TO OPINION BELOW.

The unreported opinion of the Woodbury County District Court (technically, under Iowa procedure, a Ruling on Points of Law) is reprinted at pages 61-73 of the Record.* The opinion of the Supreme Court of Iowa,

* Record citations are to the Record printed for use of the Supreme Court of Iowa below, nine copies of which have been filed with this Court together with the Certified Transcript.

reprinted in the Appendix, *infra*, pp. 11-17, has not been reported officially.

JURISDICTION.

The judgment of the Supreme Court of Iowa was entered on January 15, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Whether, in a suit to compel arbitration under Section 301(a) of the Labor-Management Relations Act of 1947, the Court usurps the function of the arbitrator in deciding that a walkout allegedly in violation of a no-strike clause in the collective bargaining agreement amounts to a waiver by the union of its right to arbitrate.

2. Whether, in a suit under Section 301(a) to compel arbitration, a court can decide, on the pleadings, that a walk-out violated the no-strike clause even though the union expressly denied such violation.

3. Whether, in a suit under Section 301(a) to compel arbitration, the court usurps the function of the arbitrator in deciding that participation in a walkout allegedly in violation of a no-strike clause is just cause for discharge.

4. Whether filing unfair labor practice charges with the National Labor Relations Board constitutes a waiver by the union of its contract right to submit to arbitration the separate issue of whether the discharges were for just cause within the terms of the collective bargaining agreement.

STATUTE INVOLVED.

The statutory provision involved is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185(a), which reads as follows:

Suits for violation of contracts between an employer

and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT.

Petitioner, a labor organization, filed a petition in equity on August 26, 1961 in the District Court of Woodbury County, Iowa, invoking that court's concurrent jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947 (R. 3-11). The petition sought a decree compelling the employer-Respondent to submit two grievances to arbitration in accordance with the provisions of a collective bargaining agreement between Petitioner and Respondent (R. 11-35). One grievance charged Respondent with a breach of the collective bargaining agreement by the improper discharge of an employee; the other protested the improper discharge of 190 employees and sought their reinstatement (R. 36-37).

Respondent filed an answer and a counterclaim and pleaded certain affirmative and legal defenses (R. 42-48). Among other matters, Respondent alleged that Petitioner and its members had engaged in a strike contrary to the no-strike clause in the agreement, and that Petitioner's "election of a strike constituted a waiver of any right to proceed further on said alleged grievance . . ." (R. 44-45). In its reply, Petitioner denied that it had engaged in strike action and asserted that "questions concerning any alleged waiver of [its] right to arbitrate . . . [concern] the merits of the grievance . . . and must be determined solely by the arbitrator . . ." (R. 48-50).

On January 10, 1962, Respondent filed an application, pursuant to Rule 105 of the Iowa Rules of Civil Procedure, asking the court to hear and determine points of law raised in the pleadings (R. 60). Specifically, the Iowa court was asked to rule that Petitioner was not entitled to compel Respondent to arbitrate for the reasons that:

1. Under Iowa law and procedure an executory agreement to arbitrate was not specifically enforcible;
2. Petitioner had waived its right to arbitrate a) by "bringing an action before the NLRB to enforce its claimed rights"; and b) by engaging in a walkout in violation of contract; and
3. The notice of grievance was not timely.

On Februdry 13, 1962, the Iowa court sustained all of Respondent's contentions except the third, which the court stated could not be determined upon the pleadings alone (R. 61-73). Specifically, the court rejected Petitioner's contentions that federal law and not state law applied; that under federal law the arbitrator and not the court should determine the effect, if any, of an alleged walkout in violation of a "no-strike" clause; and that filing unfair labor practice charges with the NLRB did not waive the contractual right to arbitrate.

The court held that Iowa law and not federal law applied; that under Iowa common law an executory agreement to arbitrate would not be specifically enforced; that filing an unfair labor practice charge protesting the discharges constituted a waiver of the right to arbitrate under the contract; and that the walkout assertedly in violation of the "no-strike" clause (notwithstanding Petitioner's express denial in the pleadings) also amounted to a waiver of the right to arbitrate (R. 61-73). These rulings completely adjudicated Petitioner's rights and had the effect of dismissing the petition on matters of law. There

remained for adjudication in the lower court only Respondent's counterclaim for damages for breach of contract.

Petitioner promptly applied to the Supreme Court of Iowa for an order allowing an interlocutory appeal (R. 74-78), which application was granted (R. 78). On January 15, 1963, the Supreme Court affirmed the lower court (Appendix, pp. 11-17). Since Respondent had conceded that the lower court erred in refusing to recognize that federal law applied, the Supreme Court of Iowa acknowledged that federal law governed and that under that law arbitration clauses in collective bargaining agreements are specifically enforceable (Appendix, pp. 13-14).

The Court went on to hold, however, that Petitioner had waived its right to arbitrate by the alleged walkout in breach of the no-strike clause in the collective agreement, notwithstanding the fact that Petitioner had expressly denied violating the no-strike clause. One Justice dissented, stating (Appendix, p. 17): "What I believe to be the error in the majority opinion is holding that once an evidence of a violation of a no-strike clause appears the parties are no longer required to arbitrate."

The majority opinion also observed (Appendix, p. 16): "Two other matters are urged but we find no merit therein and make no comment thereon." Counsel has no means of determining to what "two other matters" the Supreme Court had reference, although they may have been reasons urged by Respondent for affirmance. Only one "other matter" was urged by Petitioner—that the lower court erred in holding that Petitioner had waived its rights to arbitrate by filing unfair labor practice charges. Since it is conceivable that this is one of the "other matters" the Supreme Court had in mind and that it intended to affirm the lower court on this issue also, Petitioner considers it necessary to bring the issue before this Court.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Iowa Supreme Court is directly in conflict with recent decisions of this Court. The decision below holds that: 1) as a matter of Federal law, a union is barred from arbitrating the discharge of employees for participating in a walkout allegedly in violation of a no-strike clause; and 2) a court can determine, from the pleadings alone and despite the union's denial of any violation, that a walkout is in violation of a no-strike clause.

It has never been contended that the grievances here involved are not arbitrable under the collective bargaining agreement. In deciding that a walkout allegedly contrary to a no-strike clause amounts to a waiver of the right to arbitrate the question of just cause for discharge of employees for participation in the walkout, the Iowa courts have necessarily usurped the function of the arbitrator and decided the *merits* of grievances.

The decision thus flies in the face of this Court's decisions in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960), in which this Court delineated the respective functions of court and arbitrator, leaving to the arbitrator all determinations of the merits. The decision of the Iowa Supreme Court holds that a court may invade the province of the arbitrator and decide whether an alleged strike was just cause for discharge. This amounts to deciding the merits of the dispute.

The Iowa ruling is also at odds with this Court's reasoning in *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), in which this Court rejected the argument that an employer defeats

the union's right to arbitrate by claiming a breach of the no-strike clause in a situation in which the union has specifically denied that there was a strike.

2. The decision below is directly in conflict with the decision of the United States Court of Appeals for the Third Circuit in *International Moulders and Foundry Workers Union, Local 239* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (1960), in which the facts and the employer's arguments were all but identical to those in the present case. The Court of Appeals ordered arbitration, pointing out that the case was "precisely suited to the arbitration process under the agreement that the parties have made", and that the arbitrator must decide whether the walkout was justified and, if not, whether discharge was a proper penalty.

The decision below is also directly in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Local 748, Int'l Union of Electrical, Radio and Machine Workers* v. *Jefferson City Cabinet Co.*, 313 F. 2d ....., 46 CCH Lab. Cases ¶ 18,100, decided on February 23, 1963. There, on facts very similar to those here, the Court of Appeals rejected the employer's arguments as to waiver by breach of a no-strike clause and directed the employer to arbitrate the discharges of employees who participated in the strike.*

Insofar as the Supreme Court of Iowa may have intended to affirm the lower court's ruling that filing an unfair labor practice charge with the National Labor Relations Board waived the union's right to arbitrate the discharges, it is directly contrary to the decision of the

* Since this Petition was set up in page-proof, counsel have noted a decision of the Court of Appeals for the Fourth Circuit which is contrary to that of the Supreme Court of Iowa. *United Textile Workers of America, AFL-CIO, Local 120* v. *Newberry Mills, Inc.*, ..., F. 2d ....., 47 CCH Lab. Cases ¶ 18,157, decided March 6, 1963.

United States Court of Appeals for the Fifth Circuit in *Lodge No. 12, Int'l Ass'n. of Machinists* v. *Cameron Iron Works*, 257 F. 2d 467 (1958), cert. den. 358 U. S. 880 (1958).

3. The decision of the Iowa Court construes *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957), in a manner at odds with that opinion and with this Court's interpretation of it. The Court below referred to the "quid pro quo" rule of *Lincoln Mills*, and applied it as follows (Appendix p. 16):

> If . . . the view is taken that a no-strike clause means what it says and that if the Union has the right to require arbitration of differences arising between it and the Company then the Company has a similar right to have the Union abide by its agreement we are well along the road to labor and management tranquility. It "should not have its cake and eat it too". We think the "quid pro quo" view advanced in the *Lincoln* case, supra, is the sound and sensible rule to adopt . . . We think the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout.

The Iowa Court thus viewed the language in *Lincoln Mills* (353 U. S. 448, 455)—"Plainly the agreement to arbitrate grievances disputes is the quid pro quo for an agreement not to strike"—as though the arbitration and no-strike provisions were "mutually dependent covenants". Yet this Court has declined to accept such an interpretation and has emphasized that there is "no . . . inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation." *Drake Bakeries* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 261, fn. 7 (1962). The Iowa Court's mechanical view of a "quid pro quo" rule would mean not only that every violation of the no-strike clause would preclude arbitration, but also that every refusal by an employer to arbitrate would relieve the Union of its obli-

gation not to strike. "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach . . ." 370 U. S. 254, 262 (1962).

The Congressional policy of having the parties resolve their disputes by a method agreed upon by them would be greatly hampered were the Iowa Court's conception of what it calls the "quid pro quo" rule to prevail. This Court has repeatedly called attention to the importance of fashioning a body of federal labor relations law which will "preserve the stabilizing influence of the collective bargaining contract . . ." *Drake Bakeries* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 263-64 (1962); cf. *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 456-57 (1957); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 566-67 (1960).

The position taken by the Supreme Court of Iowa would go far to undermine the stability thus far achieved by Congress and this Court.

CONCLUSION.

This Petition outlines a fundamental divergence between a state supreme court's view of an important area of federal labor relations law and that of this Court and of several Courts of Appeals. Admittedly, such a conflict is less usual than those between Courts of Appeals. Since state courts may interpret, apply, and fashion federal law with respect to collective bargaining agreements, however, it is probable that the type of conflict here involved will become more frequent. The need for uniformity among the highest courts of the states and the Courts of Appeals in the interpretation and application of federal law would seem apparent.

The decision of the Supreme Court of Iowa creates diversity and conflict which this Court, in keeping with its traditional functions, should "resolve and accommodate . . ." *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 514 (1962).

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, FRUCHTMAN & WATT,
105 West Adams Street,
Chicago 3, Illinois,

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa,
Of Counsel.

APPENDIX.

IN THE SUPREME COURT OF IOWA.

Local Union No. 721, United Packinghouse Food and Allied Workers, AFL-CIO, *Appellant*, *vs.* Needham Packing Company, Inc., d/b/a Sioux City Dressed Beef, a Corporation, *Appellee.*	164 50664 Filed January 15, 1963.

* * * * *

Appeal from Woodbury District Court. George M. Paradise, Judge.

* * * * *

Appeal from order on points of Law under Rule 105, R. C. P., as to force and effect of a no-strike clause in a collective bargaining agreement. Affirmed and Remanded.

* * * * *

Harry H. Smith,
Sioux City Iowa,
Cotton, Fruchtman & Watt,
Chicago, Ill.,

For Appellant,

Shull, Marshall, Mayne, Marks & Vizintos,
Sioux City, Iowa,
James A. Gilker,
Fort Smith, Arkansas,

For Appellees.

Plaintiff, as bargaining agent for employees of the defendant, and defendant entered into a collective bargaining agreement which contained the following provision, being paragraph 33-C(5) thereof, "In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration *upon the request of the Union.* * * * Said Arbitration Board shall have authority only to interpret and apply the provisions of this contract. Its award * * * shall be binding upon the Company and the Union and upon the employees involved" (Italics added). The agreement, paragraph 9, provided: "It is agreed that during the period of this agreement the employees shall not engage in and the Union shall not call or sanction any slow down, work stoppage or strike, and no lock out shall be inaugurated (sic) by the Company".

This equitable action brought by the Union seeks to specifically enforce arbitration by the Company of certain grievances filed by the Union and which the Company refuses to arbitrate. Generally, the facts as set forth in the pleadings are,—In May 1961, the Company discharged an employee, such discharge being arbitral as to whether it was for just cause, as authorized by paragraph 8(a) of the bargaining agreement. Following such discharge, 190 employees left their jobs and have refused to return until the question of just cause for the discharge of the one employee has been adjusted. The Company contends that by walking out the employees breached Par. 9 of the bargaining agreement and that the same is no longer in force and effect. It is not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto. Also, by counterclaim the Company asks substantial damages on account of the walk-

out. The Company made application to the Court to rule upon three points of law, as provided for under Rule 105, R. C. P., to-wit: (1) Plaintiff not entitled to relief since Iowa law denies specific enforcement of an executory agreement to arbitrate. (2) Plaintiff not entitled to relief since it has waived the right to enforce arbitration provision, by the walkout and by filing complaint before the NLRB to enforce its claim. (3) No grievance filed within time required by agreement and the right to arbitrate has expired. The trial court sustained defendants's contention as stated in No. (1) and (2) above and rejected No. 3, leaving for further determination the damage issue presented by the counterclaim. Plaintiff was granted permission to appeal under Rule 332 R. C. P.

I. Error No. 1, is to the effect that the issues raised in the case must be determined under federal law, not the state. It is conceded that the questions here come within the purview of Section 301(a) 29 U. S. C. Sec. 185(a) which provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." The United States Supreme Court, while holding that State Courts may hear and determine controversies coming under Section 301(a), held that in so doing they must apply and follow the federal law. *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 82 S. Ct. ....., 7 L. Ed 2d 483. In the leading case of *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 455, 77 S. Ct. 923, 1 L. ed. 2d 972, the Court said "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation

(Section 301) does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way". (Italics ours). See also, *Teamsters, Chauffeurs, Warehousemen & Helpers* v. *Lucas Flour Co.*, 369 U. S. 95, 7 L. ed. 2d 593, 82 S. Ct. 571; *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 8 L. ed. 2d 462, 82 S. Ct. ____. Appellee concedes in argument that Federal law must be applied so we need spend no further time on this assigned error except to say that under Federal law, agreements to arbitrate may be specifically enforced. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 4 L. ed. 2d 1409, 80 S. Ct. 1347; *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593, 4 L. ed. 2d 1424, 80 S. Ct. 1358.

II. Error is claimed on the Court's ruling that right to arbitration was waived by the walkout. The appellant cites and relies upon the three steelworker cases, last above cited. In those cases arbitration was ordered but in none of them was the breach of a no strike clause involved as it is in the instant case. We do not find that the exact question before us has been determined, however there are cases dealing with the no strike clause. *Atkinson* v. *Sinclair Refining* case, *supra*, is an action by the Refining Co., to recover damages for a breach of a no-strike clause in a bargaining agreement. Defendant moved to stay proceedings pending arbitration. The stay was denied, the court saying the agreement expressly provides that arbitration may be invoked only at the option of the Union. At no place in the contract does the Union agree to arbitrate at the behest of the Company. The Company is to take its claim elsewhere,

which it has now done. In *Drake Bakeries* v. *Local 50, American Bakery & Confectionery Workers International AFL-CIO*, 370 U. S. 254, 8 L. ed. 2d 474, 82 S. Ct. ——, decided the same date as the *Sinclair* case, *supra*, the court ordered a stay of action for damages on account of a breach of a no-strike clause pending arbitration. It bases its holding upon the all inclusive provision in the agreement to arbitrate, saying that the arbitration agreement "obligated the Company to arbitrate its claim for damages from forbidden strikes by the Union".

While in the *Bakeries* case, the Company contended, under the "quid pro quo" rule, (See *Lincoln* case *supra*) there was a waiver of right to arbitrate the court states no such action was taken by the Company and no decision was made thereto. In the instant case we are squarely faced with issue of a waiver of right to arbitrate because of breach of no-strike clause.

In the *Warrior & Gulf* case, *supra*, the court said, page 583 of 363 U. S. "A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense anything that management does is subject to the agreement * * *". Whether the "quid pro quo" rule will be followed to the extent of declaring a breach of a no-strike clause constitutes a waiver of rights to arbitrate under the agreement, depends upon the view to be taken of Section 301(a), *supra*. Clearly, under said rule work stoppage by strikes, etc., is not conducive to economic tranquility and progress. If the view is taken that a strike is merely another incident or grievance which should be decided as are other contract violations, it would seem the Company has relinquished many valuable rights and received nothing in return and

arbitration agreements will be shied away from. In fact the purpose of Section 301(a) will be entirely emasculated. If, on the other hand, the view is taken that a no-strike clause means what is says and that if the Union has the right to acquire arbitration of differences arising between it and the Company then the Company has a similar right to have the Union abide by its agreement we are well along the road to labor and management tranquility. It "should not have its cake and eat it too". We think the "quid pro quo" view advanced in the *Lincoln* case, *supra*, is the sound and sensible rule to adopt. This is the view in effect taken by the trial court and though Iowa laws were being applied, we see no conflict with the federal laws and think that actually it was federal law that was used. We think the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout.

Two other matters are urged but we find no merit therein and make no comment thereon.

The order of the trial court is affirmed and cause remanded for further proceedings pending therein.

AFFIRMED AND REMANDED.

Garfield, C. J., Larson, Thompson, Peterson, Snell and Moore, JJ. concur.
Thornton, J., dissents.
Stuart, J., takes no part.

Thornton, J. (dissenting).

I respectfully dissent. The pleadings in this case should not be construed to hold that a violation of the no-strike clause is admitted or stands undenied. The question is not ready for decision under rule 105, Rules of Civil Procedure.

Further, the parties have agreed on a tribunal for the determination of questions arising, "with reference to the proper interpretation or application of the provisions of this contract." This provision is not a narrow one. It includes the no-strike clause. The fact that arbitration may be instigated only at the request of the union should not be determinative. The company has so agreed. Whether or not there has been a violation of the no-strike clause is proper for the arbitrators to consider in determining the grievance. A waiver would go to the merits of that question.

What I believe to be the error in the majority opinion is holding that once an evidence of a violation of a no-strike clause appears the parties are no longer required to arbitrate. Under the broad provision for arbitration violations by both parties must be considered by the arbitrators.

Under the provisions of this contract where the union has requested arbitration in accordance with the contract that proceedings should be compelled. The company is denied no rights. It has agreed to be bound by the award of the arbitrators. If after that proceedings is complete it has a damage claim it may proceed in the courts. That is no concern of ours at this time. I would reverse.

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
MAY 31 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner*,

vs.

NEEDHAM PACKING COMPANY, d.b.a. SIOUX CITY DRESSED BEEF, A CORPORATION, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION

ALFRED L. SCANLAN,
734 15th Street, N.W.,
Washington 5, D. C.

JAMES A. GILKEY,
3015 Free Ferry Road,
Fort Smith, Arkansas

JESSE E. MARSHALL,
1109 Badgerow Building,
Sioux City, Iowa,
Attorneys for Respondent.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D. C.
Of Counsel.

May 31, 1963.

TABLE OF CONTENTS

Item	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	4
1. *The Parties and the Collective Bargaining Agreement*	4
2. *The Walkout and Ensuing Strike*	5
3. *Proceedings Below*	7
Argument	9
I. The Judgment of Which Review Is Sought Is Neither Final Nor Complete	9
II. The Decision Below Was Correct; It Raises No Conflict of Decisions	14
Conclusion	22
Appendix A	23

CITATIONS

Cases:

Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238	16, 17, 18, 21
Bacon & Sons v. *Martin*, 302 U.S. 642	11
Bostwick v. *Brinkerhoff*, 106 U.S. 3, 4	9
Cincinnati Street R. Co. v. *Snell*, 179 U.S. 395	10
Construction Laborers v. *Curry*, 371 U.S. 542	13
Cotton v. *Hawaii*, 211 U.S. 162, 170	9
Crescent Creamery v. *Milk Control Board*, 305 U.S. 559	11
Dowd Box Co. v. *Courtney*, 368 U.S. 502	14
Drake Bakeries v. *Bakery Workers*, 370 U.S. 254, 259	17, 18, 19, 20, 21-22
Egan v. *Hart*, 165 U.S. 188, 189	15
Gospel Army v. *Los Angeles*, 331 U.S. 543, 548	10
Grayson v. *Harris*, 267 U.S. 352, 357	15
International Moulders v. *Susquehanna Casting Co.*, 283 F. 2d 80 (C.A. 3, 1960)	20, 21
Jefferson City Cabinet Co. v. *International Union of Electrical, Radio & Machine Workers*, 313 U.S. F. 2d 231 (C.A. 6, 1963), cert. den. 31 U.S.L. Wk. 3388	20

	Page
Laclede Gas Light Co. v. *Public Service Commission*, 304 U.S. 398, 400	10
Louisiana Navigation Co. v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101	9
Market St. Ry. Co. v. *R.R. Commission*, 324 U.S. 548, 551	9
Mercantile National Bank v. *Langdeau*, 371 U.S. 55	13
Needham Packing Co., Inc., et al v. *United Packinghouse, et al*, No. 83519 (Equity), District Court for Woodbury County, Iowa	7
Radio Station WOW v. *Johnson*, 326 U.S. 120, 126	13
Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62, 67	9, 13
Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69, 72	10
Ruth & Clark v. *Emery*, 235 Ia. 131, 15 N.W. 2d 896	10
Textile Workers v. *Lincoln Mills*, 353 U.S. 448, 455	19
United Steelworkers of America v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582	16
United Textile Workers of America v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C.A. 4, 1963)	20

Statutes and Rules:

Rule 105, Iowa Rules of Civil Procedure	3, 8, 10, 12
Rule 244(h), " " " " "	11
Rule 247, " " " " "	11
Rule 332(a), " " " " "	3, 10, 12
Rule 335, " " " " "	12
28 U.S.C. 1257(3)	2
29 U.S.C. 152(5)	4
29 U.S.C. 185(a)	3, 4

Miscellaneous:

Ann., 8 L. Ed. 1013	22
Messer & Volz, Iowa Practice, (West, 1957), Vol. II, p. 363	10
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.), p. 196	15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 996

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner*,

vs.

NEEDHAM PACKING COMPANY, d.b.a. SIOUX CITY DRESSED BEEF, A CORPORATION, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Woodbury County District Court is unreported (R. 61-73), but is printed as Appendix A attached hereto. The opinion of the Supreme Court of Iowa, including the dissenting opinion, printed as an appendix to the petition, has been reported at 119 N.W. 2d 141.

Jurisdiction

The judgment of which review is sought here was entered by the Supreme Court of Iowa on January 15, 1963. A petition for certiorari was filed in this Court on April 6, 1963. On May 10, 1963, Mr. Justice White entered an order ex-

tending the time for respondent to answer the petition to and including May 31, 1963.

Petitioner claims jurisdiction exists in this Court by virtue of 28 U.S.C. 1257(3). However, for the reasons stated below, respondent contends that jurisdiction is invoked prematurely at this time. The decision of the Supreme Court of Iowa is not a final and complete judgment disposing of all elements of the present controversy between the parties.

Questions Presented

1. Whether a decision by the Iowa Supreme Court, under an interlocutory appeal procedure afforded by Iowa law, disposing of a federal issue raised by complaint and answer, but remanding the case for further proceedings in accordance with said decision, constitutes a final and complete order for purposes of review by this Court pursuant to 28 U.S.C. 1257(3), under circumstances where the same issue passed upon by the Iowa Supreme Court is also involved in respondent's counterclaim. The counterclaim remains to be tried by a lower court of the State, and Iowa practice would permit reconsideration of the issue temporarily foreclosed by the Iowa Supreme Court's ruling on petitioner's interlocutory appeal in the event that petitioner were successful in showing, upon trial of the counterclaim, that the facts established that the initial decision had been based on an erroneous factual premise, i.e., that there had been an unjustified strike or walkout by petitioner's members in violation of a no-strike clause.

2. Whether the decision of the Supreme Court of Iowa conflicts with applicable rulings of this Court insofar as it held that a walkout by members of the petitioning union was such a breach of a no-strike clause in the collective bargaining agreement between the petitioner and the respondent company as to permit the respondent, after it

had warned the petitioner and its members that it was terminating the collective bargaining agreement if they refused to return to their jobs, to terminate the contract, thereby relieving respondent of the duty of arbitrating alleged grievances arising subsequent to the walkout.

Statutes Involved

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), is set forth at pp. 2-3 of the petition.

Rule 332(a) of the Iowa Rules of Civil Procedure provides in pertinent part that:

> "Any party aggrieved by an interlocutory ruling or decision, including one appearing especially whose objections have been overruled, may apply to the supreme court or any justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted after notice and hearing . . . on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness before trial on the merits will better serve the ends of justice. . . ."

Rule 105 of the Iowa Rules of Civil Procedure provides as follows:

> "The court may, in its discretion, and must, upon application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case

of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal."

Statement

1. *The Parties and the Collective Bargaining Agreement.* The respondent is a corporation which operates a meat packing plant in Sioux City, Iowa (R. 4). It is engaged in an industry affecting commerce within the meaning of applicable provisions of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner is a labor organization within the meaning of applicable provisions of the National Labor Relations Act, 49 Stat. 450, 29 U.S.C. 152(5), and of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner, a local union, maintains its principal place of business in Sioux City, Iowa (R. 3). The petitioner is an affiliate of the United Packinghouse, Food and Allied Workers, AFL-CIO (R. 11). The international union has an office and field representative at Des Moines, Iowa (R. 33).

On or about October 1st, 1960, the petitioner (Local Union No. 721) and the international union to which it belongs entered into a collective bargaining agreement with the respondent (R. 11-35). Under paragraph 2 thereof, the respondent recognized the international union and the petitioner "as the sole and exclusive bargaining agency for all the production employees employed by the Company," excluding certain categories of employees not pertinent here (R. 12).

The collective bargaining agreement between the parties provided in paragraph 9 thereof that, during the period of its existence, "the employees shall not engage in, and the Union shall not call or sanction, any slowdown, work stop-

page, or strike, and no lockout shall be inaugurated by the Company." (R. 14). The collective bargaining agreement also contained provisions covering the adjustment of grievances between the petitioner and the respondent (R. 30-32). Paragraph 33(c)(5) thereof provided that "in the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such disputes cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union . . . ." (R. 31). The collective bargaining agreement also required that any "grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance . . . ." If this procedure was not observed, the agreement provided that the grievance "shall be considered completely waived." (R. 30).

2. *The Walkout and Ensuing Strike.* On May 11, 1961, an employee of the respondent and a member of the petitioning union, Anton Stamoulis, left his job and refused to proceed under the grievance procedure by putting his grievance in writing as required by the collective bargaining agreement (R. 58). On that same day, May 11, 1961, 190 other employees, all members of Local No. 721, the petitioner herein, walked off their jobs (R. 58). This action was taken in the face of the respondent's warning that it would be considered a breach of contract (R. 58). The petitioner, the exclusive bargaining agent for petitioner's production employees, admitted in the trial court that employees represented by it "left their jobs at [respondent's] . . . plant on or about May 11, 1961." (R. 63). The trial court, after oral hearing and the filing of briefs (R. 61), but without the taking of evidence, found that there was

"no substantial dispute here as to the facts" (R. 70); employees represented by the petitioner "did engage in a walkout" on May 11, 1961 (R. 64). The respondent denies, however, that it authorized any walkout by the 190 employees on May 11, 1961 (R. 48).

On May 12, 1961, respondent sent a letter to each of the 190 striking employees, advising them that their action in leaving their jobs was in violation of the contract between the union and itself. The letter also advised that if they did not immediately return to work, their jobs would be filled by permanent replacements. The letter further informed the striking employees that the alleged cause of leaving their employment, that is, the discharge of Stamoulis, would be processed as a grievance under the terms of the collective bargaining agreement (R. 58-59). On or about May 15, 1961, at a meeting of petitioner, Local 721 and its members unanimously rejected the offer of the respondent that they return to work and that the Stamoulis case be handled as a grievance, informing respondent of their rejection of its offer on or about May 15, 1961 (R. 59). The respondent treated this rejection as a termination of the employment of Stamoulis and the 190 other employees who had left their jobs on May 11, 1961 (R. 59).

The walkout and the strike which began on May 11, 1961 has continued to date, and picketing in front of the Company's premises has also been continuous since the first day of the walkout (R. 44). The petitioner, in its reply to the respondent's answer in the trial court, denied that it struck against the respondent, or, as alleged by the respondent, set up picket lines in front of the Company's premises. However, as previously stated, petitioner admitted that certain of its members within the bargaining unit repre-

sented by it did leave their jobs on or about May 11, 1961 (R. 48).[1]

On July 5, 1961, a written grievance in behalf of Stamoulis was filed with the respondent, and on the same day a grievance protesting the discharge of 190 other employees was also submitted by the petitioner to the respondent (R. 36-38). On July 12, 1961, the respondent advised the petitioner's field representative that it was declining the request of July 5, 1961, to process the alleged grievances submitted, on the ground that the petitioner and its members by their conduct had repudiated and terminated the collective bargaining agreement of October 1, 1960 (R. 41).

3. *Proceedings Below.* On August 26, 1961, the petitioner filed a suit in equity in the District Court of Woodbury County, Iowa, invoking that Court's concurrent jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947 (R. 3-11). By its petition, the union sought a decree compelling the respondent to submit the grievances filed with the Company on July 5, 1961 to arbitration, allegedly in accordance with the provisions of the collective bargaining agreement (R. 11-35). The respondent answered and filed a counterclaim for damages in the amount of $150,000 for petitioner's breach of the contract of October 1, 1960. In addition, respondent pleaded certain affirmative and legal defenses (R. 42-48). One of the respondent's basic contentions was that petitioner and its members had

---

[1] In an unreported opinion and decree issued on July 15, 1961, in *Needham Packing Co., Inc., d.b.a. Sioux City Dressed Beef, a Corporation* vs. *United Packinghouse, Food and Allied Workers, AFL-CIO Local No. 721, et al*, No. 83519 (Equity), the District Court for Woodbury County, Iowa found that Local No. 721 had "advocated and participated," and certain of its officers and members had engaged in, "mass picketing, threats and violence and intimidation of employees" of the respondent. The Court found that such mass picketing, threats, violence and acts of intimidation were "unlawful," and it thereupon issued an injunction against such acts, the injunction having remained in effect since that time.

engaged in a walkout and a strike, contrary to the no-strike clause of the collective bargaining agreement (R. 44). Respondent contended below, and asserts here, that the petitioner's "election of a strike" under the circumstances presented "constituted a waiver of any right" of the petitioner to proceed with the grievances which it had submitted on July 5, 1961 (R. 45). As stated above, petitioner denied that it had engaged in any strike action and asserted that "questions concerning any alleged waiver of [its] right to arbitrate . . . [concern] the merits of the grievance . . . and must be determined solely by the arbitrator. . . ." (R. 48-50).

After the pleadings had been closed, the respondent made application to the trial court to rule upon three points of law, as permitted under Rule 105 of the Iowa Rules of Civil Procedure. After a hearing on the application, the District Court of Woodbury County, in a written opinion, a copy of which is attached hereto, sustained the contentions raised by the respondent. The petitioner promptly applied for and was permitted to take an interlocutory appeal to the Supreme Court of Iowa (R. 78). The Supreme Court affirmed the lower court in its decision of January 15, 1963, holding therein, with one Justice dissenting, that the petitioner had waived its right to arbitrate by a walkout in breach of the no-strike clause of the collective bargaining agreement. The Supreme Court noted that it was "not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto."[3]

---

[3] 119 N.W. 2d 141.

ARGUMENT

I

The Judgment of Which Review Is Sought Is Neither Final Nor Complete

Under 28 U.S.C. 1257(3), this Court reviews only final judgments of state courts. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67. It is also the well established rule that a state court judgment, to be reviewable here, must be complete in that it finally disposes of all elements of the controversy. *Cotton* v. *Hawaii*, 211 U.S. 162, 170. If the judgment is not one which disposes of the whole case on its merits, it is not final. *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 4. This Court has consistently declined to undertake piecemeal review of the actions of state courts. *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101. A judgment, as the Court said in *Market Street R. Co.* v. *R. R. Commission*, 324 U.S. 548, 551,

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The ruling of the Supreme Court of Iowa which this Court has been asked to review in the instant case is not a final or complete order, ripe for review at this time. It is true that the decision of the Iowa Supreme Court has determined an important federal legal issue in the case. It has decided that a walkout in violation of a no-strike provision in a collective bargaining contract can sustain a judicial determination that the agreement was thereby terminated and the respondent company, against which the

walkout was directed, thereafter could refuse to arbitrate disputes arising subsequent to the walkout and after the termination of the contract. The disposition of that issue, however, does not automatically give rise to appealability of the decision of the Iowa Supreme Court. See, *e.g.*, *Cincinnati Street R. Co.* v. *Snell*, 179 U.S. 395; *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U.S. 398, 400.

In determining the finality of a state court judgment, the local law has been consistently regarded as a material, though not decisive, factor. *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 548. The effect which a state court judgment is accorded under the local rules of practice is germane to a determination of whether or not the judgment is final and ready for review in this Court. *Richfield Oil Corp.* vs. *State Board of Equalization*, 329 U.S. 69, 72.

The appeal which the petitioner took to the Supreme Court of Iowa was from a hearing and determination of points of law by the trial court, pursuant to Rule 105 of the Iowa Rules of Civil Procedure. Rule 332(a) of the Iowa Rules permits an interlocutory appeal in such circumstances "in advance of final judgment." For the appeal to be allowed, however, the Supreme Court of Iowa must find that the ruling of the lower court involves substantial rights, "will materially affect the final decision," and that a determination "before trial on the merits" will better serve the ends of justice. Leading commentators on Iowa civil practice have noted that an interlocutory order under Section 332(a) is one which "does not dispose of the cause, being one that is directed preparatory to a final decision." Messer and Volz, Iowa Practice (West, 1957), Vol. II, p. 363; *Ruth & Clark* v. *Emery*, 235 Ia. 131, 15 N.W. 2d 896.

In affirming the ruling of the lower court, the Supreme Court of Iowa remanded the cause for "further proceedings

pending therein." It did not direct the entry of an order or of judgment prior to a final determination of the issues that remain for resolution. Accordingly, there is not presented here the situation where a decision of the highest court of a state leaves open only the performance of a ministerial act on the part of the trial court. *Bacon & Sons* v. *Martin*, 302 U.S. 642, appeal dismissed for lack of finality, but a final judgment subsequently obtained and dismissed for want of a substantial federal question, 305 U.S. 380; *Crescent Creamery* v. *Milk Control Board*, 305 U.S. 559.

Respondent's counterclaim is still before the lower court; it has not been tried. The trial court has not yet entered any order disposing of the entire controversy between the parties. On the trial of the counterclaim, the petitioner will have full opportunity to present evidence and to argue the question whether there was a breach of the no-strike provision of the collective bargaining contract. If petitioner loses on that issue, it will have another opportunity to appeal to the Iowa Supreme Court and ultimately, if necessary, again seek *certiorari* of this Court. On the other hand, if the union prevails in the trial court and defeats the counterclaim by a showing that the strike or walkout did not violate the no-strike provision of the contract, petitioner will not be without the means to reopen in the Iowa courts the federal issue temporarily foreclosed by the January 15, 1963 decision of the Supreme Court of Iowa that the union was barred from arbitrating the discharge of employees because of their participation in a walkout in violation of a no-strike clause.

Rule 244(h) of the Iowa Rules of Civil Procedure authorizes the granting of a new trial on the basis of errors "of law occurring in the proceeding, or mistakes of fact by the Court." Under Rule 247 of the Iowa Rules, such a motion can be made within 10 days after judgment, and under Rule

335, an appeal of a denial of such a motion may be taken within 30 days after the ruling on the motion. Therefore, should the petitioner defeat the counterclaim on the basis of evidence which establishes that the walkout was not in violation of the no-strike provisions of the collective bargaining agreement, under Iowa procedure it would have available to it persuasive grounds on which to move for a new trial of its original complaint or reconsideration of the earlier rulings of law by the District Court for Woodbury County, and if necessary, to appeal again to the Supreme Court of Iowa.

Indeed, it is doubtful even that resort to a motion for a new trial would be necessary to reopen the petitioner's claim. While the decision of the trial court is, under Rule 105 of the Iowa Rules of Civil Procedure, "final" in the sense that under ordinary circumstances no attack may be made upon it, it was, as has been indicated, treated as "interlocutory" for purposes of appeal to the Supreme Court of Iowa. Thus, under Rule 332(a) a "final decision" is still to be entered. Together, these rules appear to indicate that the decision is, under State procedure, not *res judicata*, but rather establishes only the law of the case. If this be so—and petitioner cites no authority to the contrary—then the ruling is subject to reconsideration by the State courts at any time up to entry of a "final decision" disposing of both the complaint and counterclaim in a final judgment. And while arguably this might be regarded as of no practical consequence if the decision in question were wholly unrelated to the issues remaining for trial, that plainly is not the case here, where an evidentiary hearing on the counterclaim will turn upon issues intimately related to the decision as to which petitioner seeks review by this Court. Moreover, it should be noted that the consideration that trial of the counterclaim might generate additional

federal issues also weighs against assigning finality to the decision here in question. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71.

To put the matter another way, we suggest that, had petitioner awaited final judgment on the entire controversy by the State courts before petitioning for *certiorari*, this Court would not have denied review on the ground that the petition was untimely. This procedure for obtaining Supreme Court review by Iowa litigants is indicated by the terms of Iowa's interlocutory appeal act, and it would plainly be unfair to penalize them for following it. It is perhaps a credit to this petitioner's uncommon diligence that it has seized upon the earliest conceivable opportunity for Supreme Court review. However, the reward should not be the introduction of an uncertain finality rule that conceivably might later block deserved review for a less energetic, but nonetheless quite reasonable, Iowa litigant.

For the foregoing reasons, respondent submits that the decision of the Iowa Supreme Court is not a final and complete judgment ready for review in this Court. And at the least, respondent suggests that the doubt which exists regarding this Court's jurisdiction is a factor which, together with those discussed below, is relevant to the exercise of this Court's discretionary *certiorari* authority.[8]

---

[8] *Construction Laborers* v. *Curry*, 371 U.S. 542, and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, decided this Term, are not to the contrary. In the *Curry* case, the Court considered reviewable a judgment of the Georgia Supreme Court "finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and, instead, is within the exclusive domain of the National Labor Relations Board." 371 U.S. at 548; see also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 126. In the *Mercantile National Bank* case, the Court had before it a substantial claim, appealable under state law, that a federal statute, rather than a state statute, determines in which state court a national bank may be sued. The Court properly regarded such a claim as "a separate and independent matter, anterior to the merits and not enmeshed in factual and legal issues comprising the plaintiff's cause of action." In

II

The Ruling Below Was Correct; It Raises No Conflict of Decisions

If the decision which this Court has been asked to review were to possess the attributes of a final and complete judgment, nevertheless, independent reasons would exist for denying certiorari in this case. The ruling below was correct on the particular facts presented. Moreover, the holding of the Iowa Supreme Court, contrary to the petitioner's claim, does not depart from authoritative decisions of this Court, nor is it in conflict with recent decisions of several United States Courts of Appeal.

1. At the outset, one contention by petitioner concerning the decisions of the State courts should be set aside because it presents no issue worthy of review by this Court. Petitioner presents as a question: "Whether . . . a court can decide, on the pleadings, that a walk-out violated the no-strike clause even though the union expressly denied such violation." (Pet., p. 2) Obviously, the answer depends on the facts of each case. Here, the petitioner's "denial" consisted of a claim that it had not authorized the strike; but that denial was made in the context of a claim by petitioner for reinstatement of the employees who had concededly walked out and was coupled with a defense of the justness of the strike. The trial court, while recognizing that

---

the instant case, no issues are raised, or can be raised, as to the authority and jurisdiction of the Iowa courts to hear and determine the proceedings out of which this appeal arose. *Dowd Box Co.* v. *Courtney*, 368 U.S. 502. Nor, unlike the *Mercantile National Bank* case, *supra*, is there presented an important question of venue wherein federal and state statutes are in conflict, which is unrelated to the issues of fact and law in contest, and which, if not resolved by this Court, might subject the parties to "long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U.S. 555, 558.

it could not settle any issue turning upon disputed facts, concluded:

> "Even though it is alleged that the Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts." (R. 70)

Moreover, it should be noted that the trial court was quite familiar with the circumstances of the strike, since one month before the suit in question was filed that same court, after a full hearing, had issued a permanent injunction against "mass picketing, threats, violence and intimidations" by officers and members of the petitioner. See fn. 1, *supra*. While it is not plain whether the court took judicial notice of this prior proceeding, it is also not clear that it did not. Unfortunately, from the point of view of the clarity of the record, the Iowa Supreme Court's opinion adds nothing relevant to the decision of the trial court on this issue. Presumably, that Court adopted the same approach as the District Court.

If petitioner has a complaint about the adequacy of this conclusion as to facts, surely that complaint is not significant enough to warrant review by this Court. *Egan* v. *Hart*, 165 U.S. 188, 189; *Grayson* v. *Harris*, 267 U.S. 352, 357; and Robertson and Kirkham, Juridisction of the Supreme Court of the United States (1951 ed.), p. 196. Moreover, in this connection it may be noted again that petitioner will have ample opportunity in the trial of the counterclaim to introduce whatever evidence it wishes as to its lack of responsibility for the strike. And with respect to the question of whether any asserted prior actions by respondent could have justified a strike despite the no-strike clause, plainly this is a matter that could be resolved upon the pleadings

alone. The State courts held, quite properly, that a strike of 190 employees which was concededly still going on at the time of the Supreme Court hearing was obviously in violation of the sweeping terms of the no-strike clause.[4] Indeed, apart from registering a complaint about the decision of this question on the pleadings alone, petitioner does not suggest any basis for a contrary conclusion.

2. The question for review, then, should be framed solely in terms of whether a prolonged strike by petitioner, in the circumstances of this case and under the particular contract here involved, justified respondent in terminating the contract, including the arbitration provision. As to this question, we submit that the decision of the Iowa Supreme Court was correct; that it does not conflict with prior decisions of this Court or any Court of Appeals; and that it does not establish any new and far-reaching principle calling for review by this Court.

In the first place, in deciding that the strike was such a breach of the collective bargaining agreement as to justify the respondent in terminating that agreement and refusing arbitration, the State courts did not "usurp the function of the arbitrator." (Pet., p. 6) To the contrary, the courts below followed this Court's well established rule that "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241. See also *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582.

Petitioner's argument to the contrary rests upon a misreading of the State court decisions which they attack.

---

[4] The no-strike clause expresly prohibits the employees from engaging in a work stoppage or a strike *and* the Union from calling or sanctioning them (R. 14).

According to petitioner, "The decision of the Iowa Supreme Courts holds that a court may invade the province of the arbitrator and decide whether an alleged strike was just cause for discharge." (Pet., p. 6) The fact is that the trial court specifically disavowed any such ruling with respect to the discharges, stating:

> "Plaintiff argues that the arbitrator and not the Court should determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by the conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined. This Court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitutes a waiver and election of remedies." (R. 70)

In sum, the Court specifically declined to pass upon the justness of the discharges, holding only that if petitioner has a remedy it is not arbitration, which it waived. Nor is there anything in the Iowa Supreme Court's opinion to suggest that a contrary view of the matter was entertained by that Court.

Next, the decision of the Iowa Supreme Court, contrary to petitioner's contention, is not at odds with *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 259. Rather, the decision is fully in accord both with *Drake Bakeries* and with the companion decision in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238.

In both of those cases, the question was whether the employer could maintain an action for damages based upon an alleged violation of a no-strike provision, or whether instead the employer should be remitted to arbitration. In *Drake*, because of the terms of the collective bargaining agreement, the decision was against the employer; in *Atkinson*, for the same reason, the decision was for the employer.

In the case at bar, petitioner has never contested respondent's right to maintain the counterclaim in court. Rather, it has implicitly conceded that *Atkinson* rather than *Drake* governs that counterclaim.[5] Nor could there be any real argument to the contrary, for here, as in *Atkinson*, it is clear that the arbitration clause was restricted in coverage to *employee* grievances. (R. 30-31) But if respondent did not bargain away its right to maintain such an action for damages for breach of the no-strike agreement, surely that is strong evidence that such a breach would relate to so vital an element of the agreement that the offended party could terminate the entire agreement. Thus, insofar as *Atkinson* establishes respondent's right to refuse to arbitrate its claim for damages, it provides significant support for the result reached by the State courts.

In *Drake Bakeries*, the Court rejected a contention by the company that the asserted breach of a no-strike clause by the union justified the company's refusal to arbitrate. The factors stressed by the Court as relevant to that decision are important in the case at bar by virtue of their absence. First, in *Drake*, as the Court emphasized, under the agreement the company had agreed to arbitrate its claims under

---

[5] In its reply brief before the Iowa Supreme Court, petitioner said:

"Neither appellant nor the appellee is contesting on this appeal that any claim for damages for alleged violation of a no-strike clause is the subject of grievances or otherwise before this Court (Reply Brief p. 13).

the no-strike clause, 370 U.S., at 262, whereas here the company did not. Second, in *Drake* the company did not attempt to terminate the entire contract, 370 U.S., at 261, whereas here respondent did precisely that by notifying petitioner that it regarded the agreement as ended in all respects. (R. 41, 42). Finally, as opposed to the one-day duration of the *Drake Bakeries* strike, 370 U.S., at 265, here the strike was by a large number of employees and for a prolonged period of time.

We submit therefore, that the decision in question was amply warranted upon the basis of the "circumstances of the claimed repudiation," which *Drake Bakeries* indicates is the proper test. 370 U.S. at 262. Such determinative circumstances include the cause, nature, scope and duration of the strike; the limited language of the arbitration clause, under which the company's claim for damages is not arbitrable; the broad language of the no-strike provision; and the unequivocal and total rescission by respondent after ample warning that this would be the result of continuation of the strike.

There is, to be sure, language in the Iowa Supreme Court opinion relating to the *quid pro quo* theory stated in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, a doctrine which has been substantially impaired by *Drake Bakeries* if it be taken to mean that *any* violation of a no-strike provision justifies the employer *in all cases* in terminating the collective bargaining agreement. This, of course, is not respondent's theory, nor need it be resorted to in support of the decision in this case. On the other hand, if the *quid pro quo* theory be taken to mean only that in a particular case under the provisions of a particular collective bargaining agreement the no-strike clause is of such importance that a substantial violation of it permits the employer to terminate the agreement, then it is consistent with the considerations

advanced above in support of the decision. Again, the opinion of the Supreme Court of Iowa on this subject is not wholly clear. However, as we have indicated, the decision is proper, and we urge that this Court not grant *certiorari* in order to correct ambiguous language in an opinion, especially where this Court has spoken clearly on the subject already, so that it cannot reasonably be supposed that the opinion below will be misleading in future litigation.

3. We find nothing in the three lower court decisions relied upon by petitioner to justify a grant of *certiorari*. No conflict has been demonstrated.

Jefferson City Cabinet Co. v. *International U. of E., R. & M.W.*, 313 F. 2d 231 (C.A. 6, 1963), *cert. den.*, 31 U.S.L.Wk. 3388, is plainly inapposite The question there was solely whether, under a collective bargaining agreement requiring arbitration of *both* company and union claims of contract violation, the company's claim for damages for breach of a no-strike clause was subject to arbitration. The Sixth Circuit quite properly held that the arbitration clause applied. In contrast, in the case at bar, as has been demonstrated, there can be no question that the company's claim for damages need not be arbitrated.

The other two cases, *International Moulders* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (C.A. 3, 1960), and *United Textile Workers of America* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C.A. 4, 1963), are somewhat more similar to this one. However, they are readily distinguishable because of the circumstances that led the Courts in those cases to require arbitration of union grievances despite a claimed breach of a no-strike clause. Thus, in *United Textile Workers*, the Court, explicitly following the "relevant circumstances" approach of *Drake Bakeries*, relied upon the facts that the company did not attempt to terminate the entire contract, that the union contended that it had not

only failed to authorize but had actively opposed the strike, and that the company had admitted that the strike might have been called over a non-arbitrable matter, 315 F. 2d, at 219-220. And in *International Moulders* there was involved a strike for just a portion of a day by only some 30 employees and a broader arbitration clause than exists in this case.

If the "relevant circumstances" test is to be applied in cases of this type, obviously there will be some cases in which arbitration will be ordered and some in which it will be denied. This can hardly be claimed to present a conflict of decisions unless the relevant circumstances are indistinguishable, which they are not as to the decisions here involved.

4. To restate our position, only if this Court is willing to depart from the approach indicated by *Drake Bakeries* and *Atkinson* and rule that in *no* circumstances can breach of a no-strike clause justify repudiation by the company of a collective bargaining agreement might the case at bar present an issue worthy of review. While it would be inappropriate for respondent to comment at length upon the merits of such a departure from prior law, we respectfully suggest that the results under the existing approach indicate that the flexibility it permits may well prove most desirable, and that at the least the lower courts should be given a further opportunity to follow that approach. Moreover, as we have indicated, in view of the jurisdictional and state procedural problems in the case at bar, it hardly provides an adequate vehicle for a far-reaching reconsideration of this important area of labor law.

On the facts of the instant case, petitioner had the right "to terminate the entire contract . . . [and] to extinguish permanently its obligations under the arbitration provisions" of the collective bargaining agreement. *Drake*

Bakeries v. *Bakery Workers*, 370 U.S. 254, 261. The decision of the Iowa Supreme Court of course does not any more than applicable decisions of this Court, mean that every walkout or strike in violation of a no-strike clause requires the conclusion that the striking employees have waived arbitration rights given them in a collective bargaining agreement. However, surely at least until this Court has held otherwise, it is the law that in appropriate circumstances an unauthorized strike in violation of a no-strike clause may constitute such a breach of the collective bargaining agreement as to justify the employer in treating it as abrogated. Ann., 8 L. Ed. 1013. Those circumstances exist in this case.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

ALFRED L. SCANLAN,
734 15th Street, N.W.,
Washington 5, D. C.

JAMES A. GILKER,
3015 Free Ferry Road,
Fort Smith, Arkansas.

JESSE E. MARSHALL,
1109 Badgerow Building,
Sioux City, Iowa,
Attorneys for Respondent.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D. C.
Of Counsel.

May 31, 1963.

APPENDIX A

That after oral hearing and submission of Briefs at Court on February 13, 1962, Judge George M. Paradise made the following ruling upon Defendant's Application to Hear and Determine Points of Law raised in the Pleadings under Rule 105, Rules of Civil Procedure:

RULING

The plaintiff commenced this case against the defendant and in its prayer for relief prayed that the Court enter an order enjoining defendants from failing and refusing to arbitrate certain grievances claimed by plaintiff and asking specific performance by defendant of an agreement to arbitrate contained in a collective bargaining contract between plaintiff and defendant, copy of which contract is set out in the plaintiff's petition.

Defendant has answered, admitting the contract and denying that plaintiff has complied with the grievance procedure set out in said contract and has alleged affirmatively that plaintiff and the employees represented by plaintiff in violation of their agreement to arbitrate grievances, left their jobs and set up a picket line in front of defendant's premises and that said strike is continuous. Defendant further pleads affirmatively that the strike was contrary to the provisions of Section 9 of the contract providing that,

> ". . the employees shall not engage in and the Union shall not call or sanction any slow down, work stoppage or strike . ."

and that by engaging in said "slow down, work stoppage or strike" plaintiff had waived the provisions of Section 33 of said contract providing for grievance procedure and binding arbitration of any dispute

> "between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract . ."

Defendant in its answer further alleges that the right to arbitrate had been waived by the filing by plaintiff of an unfair labor practice charge against defendant with the National Labor Relations Board involving the matter in dispute between the parties.

Defendant further alleged that the application for specific performance of the arbitration provision in the contract came too late and was waived by the provision in the contract, Section 33(b),

> "Any grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance .... or it shall be considered completely waived."

Plaintiff filed reply in which it is admitted that the employees represented by the plaintiff

> "Left their jobs at defendant's plant on or about May 11, 1961,"

Plaintiff's reply further admits that it filed a charge complaining of violation by defendant with the National Labor Relations Board.

By amendment, plaintiff amended its answer, striking Paragraph 5 thereof wherein it was alleged that defendant discharged 191 persons on or about May 17, 1961, and striking from Paragraph 6 of the petition the date May 17, 1961 and substituting therefor an allegation that the said discharges occurred on June 26, 1961.

In ruling upon an application to determine points of law raised by the pleadings, the Court can consider only matters alleged as facts by the plaintiff or alleged by defendant and not denied by plaintiff. Matters on which there is a dispute as to the facts and on which evidence is necessary, cannot be determined by the Court on rulings on points of law. It is apparent to the Court that plaintiff and defendant had entered into a collective bargaining agreement, copy of which is set out as Exhibit "A" attached to plaintiff's petition, and that such contract provided, in Sections 9 and 33 thereof, that the parties would not engage in or sanction any slow down, work stoppage or strike and no lockout dur-

ing the period of the agreement. As quid pro quo therefor, the contract provides in Section 33 thereof a complete provision for "adjustment of grievances" by setting up a procedure for adjusting and handling any dispute between the parties with reference to the proper interpretation or application of the contract. Said procedure consists of a five-step process for handling grievances, terminating in binding arbitration. In other words, the contract was obviously intended to provide a peaceful method for settling any and all disputes between the parties relative to interpretation or application of any of the provisions of the contract and to render unnecessary or improper on the part of either party of a resort to economic pressure, such as a slow down, walkout or lockout. It is apparent from the pleadings and facts therein alleged, or not denied, that a dispute between the parties relative to the "interpretation or application" of the provisions of the contract did arise and that the employees represented by plaintiff did engage in a walkout and did file charges of unfair labor practice with the National Labor Relations Board With the merits of the controversy, this Court is not as this time concerned.

Law Points Raised By Defendant

Defendant has made application to the Court to rule as a matter of law that:

1. Plaintiff is not entitled to specific performance of the agreement to arbitrate the dispute for the reason that the agreement is at this time executory and that under Iowa law and procedure an executory agreement to arbitrate will not be specifically enforced.

2. Plaintiff is not entitled to specific enforcement of the arbitration provision in the contract by reason of having waived such agreement by engaging in a slow down or walkout contrary to the provisions of its contract and by reason of having filed unfair labor practice charges regarding the dispute with the National Labor Relations Board. Defendant claims that plaintiff has made an election of remedies and cannot thereafter resort to arbitration.

3. Defendant claims that the application for arbitration

by plaintiff comes too late since the petition of plaintiff claims that the discharges occurred on May 17, 1961 and the grievance applications, attached to the petition as Exhibits "B" and "C", show that they were presented July 5, 1961 and more than fourteen (14) days after the "Occurrence giving rise to such grievance" as provided by Section 33(b) of the contract.

The Court heard oral arguments of the parties on the question of ruling on law points and the parties filed written briefs which have been carefully considered by the Court, and the Court now makes the following:

Ruling on Law Points

Law Point Three

Following the filing by defendant of its application to rule on law points, plaintiff amended its petition so as to allege that the discharges complained of occurred June 26, 1961 instead of May 17, 1961 and, therefore, within fourteen (14) days of such occurrence.

Since the Court can rule as a matter of law only upon facts stated or admitted in the pleadings, it must be taken as true for the purpose of this ruling that the occurrence complained of occurred within the said fourteen (14) day period, and, therefore, the third point raised by defendant is not sustained and the Court finds and rules as a matter of law that the notices of grievance were not served too late under the terms of the contract.

Ruling on Law Point One Raised By Defendant

Defendant contends in Law Point One that the plaintiff is not entitled to the relief asked, for the reason that under the law and precedents binding upon an Iowa Court specific performance of an executory agreement to arbitrate cannot be granted.

It is apparently conceded by both parties, and the research by the Court makes it clear, that the rule at common law, and in a large majority of the States, was and is that an executory agreement to arbitrate will not be specifically

enforced. As stated in 3 Am. Jur. "Arbitration and Award" Section 31,

> "It is settled at common law that a general agreement, in or collateral to a contract, to submit to final determination by arbitrators the rights and liabilities of the parties with respect to any and all disputes that may thereafter arise under the contract is voidable at will by either party at any time before a valid award is made, and will not be enforced by the courts."

The same rule is announced by 6 C.J.S. "Arbitration and Award" Section 33 and by the following Iowa cases:

Oskaloosa Sav. Bank v. Mahaska Bank, 205 Iowa 1351, 219 N.W. 530, 60 A.L.R. 1204
Read v. State Ins. Co., 103 Ia. 307, 72 N.W. 665
Donald v. C. B. & Q. Ry. Co., 93 Ia. 284, 61 N.W. 971
Ames Canning Co. v. Dexter Seed Co., 195 Ia. 1285, 190 N.W. 167

In the Ames case, supra, the Iowa Supreme Court said,

> "The right of a party to a mere naked agreement for submission of a controversy to arbitration, to revoke it at any time before decision has been reached or an award made is recognized by the weight of authority."

It is contended, however, by the plaintiff that Section 301(a) of the Labor Management Relations Act, providing for enforcement of labor contracts in Federal Court, has changed the common law rule and that the Federal law is now binding on State Courts.

Section 301(a) Labor Management Relations Act is as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, . . . may be brought in any district court of the United States having jurisdiction of the parties, without re-

spect to the amount in controversy or without regard to the citizenship of the parties."

(1947 Taft-Hartley Amendment).

This statute was interpreted by the United States Supreme Court in 1956, Textile Workers v. Lincoln Mills, (353 U.S. 448, 32 L.C. 70, 733), as authorizing the Federal Court to specifically enforce an arbitration agreement. It is noted that nothing in this statute refers to State Courts or purports to be binding in the case of State procedure.

It must be conceded that there is a conflict of authority on the question of whether or not Section 301(a) Labor Management Relations Act, as interpreted in the Lincoln Mills case is binding upon State Courts. Both State and Federal Courts are in conflict on the matter. So far as this Court is able to determine the matter has not been authoritatively passed upon by the United States Supreme Court, and, therefore, this Court deems itself bound to follow Iowa precedents and holds as a matter of law that plaintiff is not entitled to specific performance of the agreement to arbitrate disputes.

RULING ON LAW POINT TWO RAISED BY DEFENDANT

Defendant's second point of law is that plaintiff has waived its right to arbitrate by

1. Indulging in a walkout and picketing in violation of the terms of its contract; and
2. By filing an unfair labor practice charge with the National Labor Relations Board concerning the dispute in question.

Defendant contends that there has been an election of remedies and plaintiff cannot, after having agreed not to strike and to arbitrate differences, pursue a remedy inconsistent with arbitration, and to do so is to forfeit and waive such right.

It is abundantly apparent to the Court that by the terms of the contract between the parties, it was intended that a dispute such as occurred in this case would be settled by the

grievance and arbitration procedure set out in the contract. It is equally clear that the plaintiff and its members chose to disregard the arbitration provision and engaged in a walkout. Even though it is alleged that the Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts. Plaintiff argues that there was no waiver for the reason that the question of whether or not the action taken by the employees was right or wrong is a matter that should be determined by arbitration since it involves the interpretation and application of the contract. Plaintiff argues that the arbitrator and not the Court should determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined. This Court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitutes a waiver and election of remedies. Having elected, the parties may not thereafter resort to the remedy which they have waived.

In this case the law seems to be abundantly clear.

A very good case which states the doctrine clearly is Cuneo Press v. Kokomo Paper Handlers (U.S.C.A. 7th (1956) 30 L.C. No. 70,084, 235 F. 2d, 108, Cert. Den. 352 U.S. 912). The Union and the employer had a contract providing for arbitration and agreeing that there would be no strike or lockout. The Union staged a sitdown or wildcat strike. The employer brought an action in Court for breach of contract and the Union filed a motion to stay pending arbitration. In denying the motion, the Court said:

> "Even if the unions originally had an issue referrable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength.

> Having thus violated their contract to plaintiff's damage, it was too late for them to demand arbitration on this issue."

The Cuneo case has been followed and cited repeatedly. In the year 1960 the Cuneo case was relied upon by Portland Web Pressmen's Union v. Oregonian Pub. Co. 188 Fed. Sup. 859, Aff. (on another ground), 286 Fed. 2d, 4, Cert. Den., 366 U.S. 912.

Another case is Western Express Co. v. Brotherhood of Railroad Trainmen (NY Sup. Ct. App. Div. (1950) 18 L.C. No. 65,980). In this case the question was whether a party to an agreement to arbitrate may obtain a Court order compelling arbitration after the party has taken action which amounts to an abandonment of the agreement to arbitrate, and it was the employer who had taken such inconsistent action by filing with the National Labor Relations Board. The Court said:

> "Where an employer files with the NLRB against a union unfair practice charges involving the same dispute as is the subject of an arbitration proceeding, such action amounts to an abandonment of the agreement between the employer and the union to arbitrate that subject. The employer is not thereafter entitled to compel the union to arbitrate on the subject."

Many other cases are cited in the above cases.

On the question of election of remedies, a recent U. S. Supreme Court opinion in 1959 has also been relied upon, Union Pacific Ry. v. Price, (1959) 360 U.S. 601, 37 L.C. No. 65,559.

I have found no cases contrary to the authorities above cited. The cases cited by plaintiff seem to rely entirely upon the question of whether or not the remedy *elected* by the party at fault was or was not subject to arbitration. This Court is satisfied that where parties have agreed to settle by arbitration and have failed to proceed to arbitrate in the manner or at the time agreed upon, but have, instead, chosen to rely upon their economic strength and have elected a remedy which they agreed they would not pursue, they

cannot thereafter go back and demand the remedy which they have waived.

It Is Therefore the finding and ruling of the Court that it appears as a matter of law that plaintiff has waived its right to arbitration in this case by electing the walkout or strike and by filing an unfair labor practice claim with the National Labor Relations Board.

The ruling of the Court sustaining defendant's contention in its application for ruling on law points hereinabove stated, constitutes a final order on the points so ruled upon. Since the ruling does not dispose of the whole case, however, it is interlocutory for the purposes of appeal.

(7111-8)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 12 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 102

LOCAL UNION No. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY, d/b/a SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, FRUCHTMAN & WATT,
105 West Adams Street,
Chicago 3, Illinois,

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa,
Of Counsel.

June 11, 1963.

THE GUNTHER-WAHLEN PRINTING COMPANY, CHICAGO 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 996.

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

NEEDHAM PACKING COMPANY, d/b/a SIOUX CITY DRESSED BEEF, A CORPORATION,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

This Reply is filed to Respondent's Brief in Opposition, which contends (a) that the judgment sought to be reviewed is not final, and (b) that the decision below correctly adjudicates the questions of Federal law raised.

I.

The Judgment Below Is Final and Complete, and Federal Labor Policy Requires Immediate Review.

The judgment of the Iowa Supreme Court is final and complete in every respect insofar as Petitioner's right to compel arbitration is concerned. It holds that Petitioner "waived" its right to arbitrate and thus cannot compel

arbitration. The Iowa courts have thus determined the entire controversy as to Petitioner's right to compel arbitration under Section 301(a) of the Labor-Management Relations Act (29 U. S. C. Sec. 185(a)).

To be sure, the Iowa Supreme Court remanded the case for further proceedings, but the only matter pending in the Iowa courts is Respondent's counterclaim. Respondent asserts that Petitioner should await trial of that counterclaim before seeking review of the Iowa Supreme Court decision in this Court. This position, if adhered to, would cripple the policy of the Federal labor laws favoring arbitration as the optimum means of settling disputes under collective bargaining agreements.

1. This Court has repeatedly held that the policy of the Federal labor laws requires that the arbitrator, and not a court, must hear and determine the merits of grievances which the parties have agreed to submit to arbitration. *Steelworkers* v. *American Manufacturing Company*, 363 U. S. 564 (1960). By contending that Petitioner should await trial of the counterclaim (because the same issues are said to be involved in both the complaint and the counterclaim), Respondent is saying nothing more than that, where a counterclaim is filed in a suit to compel arbitration under Section 301(a), the court, under the guise of trying the counterclaim, may examine the merits of the grievance.

Moreover, if Respondent's position were correct, an employer would need only devise some form of counterclaim alleging the facts of the grievance in order to embroil a complaint to compel arbitration in years of involved litigation. The counterclaim, in Respondent's view, justifies the court in hearing the merits. The arbitrator, if he ever heard the grievance, would have to wait until the courts had adjudicated the counterclaim.

2. If Petitioner's right to relief depended upon defeating the counterclaim, there might be some reasonable basis for Respondent's position. But Petitioner's right to relief exists independently of the counterclaim. Petitioner is entitled to arbitration even though it might lose the counterclaim. This Respondent's argument fails to recognize. Moreover, Respondent incorrectly assumes, as did the Iowa Supreme Court, that a finding—by a court—that the employees technically violated the no-strike clause necessarily constitutes a determination that the Union had no right to arbitrate. The assumption is not warranted.

There are more issues involved in the grievance than simply the question of whether the employees violated the agreement. Even if violation were found, it would still be necessary to decide whether discharge was an appropriate penalty. This is a matter for the arbitrator, not the court. *International Moulders* v. *Susquehanna Casting Co.*, 283 F. 2d 80, 81 (C.A. 3d 1960).

3. Respondent's basis for contending that the case is not ripe for review is a claim that the counterclaim raises the same issues as the complaint. Thus Respondent's contention is simply that, many months or years hence, if it loses on the trial of the counterclaim in both the trial court and the Iowa Supreme Court, Petitioner might again seek review in this Court. And, in addition, the argument goes, if Petitioner prevails on trial of the counterclaim by securing a finding that the employees did not violate the agreement by the alleged walkout, Petitioner might have "persuasive grounds" for moving for a new trial of the original complaint. Respondent wants to litigate first and then, if it loses, possibly go to arbitration. Although seriously proposed, the suggestion, in the context of this Court's decisions, is all but ludicrous.

4. Furthermore, if Respondent should decide at some time in the future to abandon its counterclaim, it would leave Petitioner completely without the only remedy which Respondent contends is proper. The right to compel arbitration under Section 301(a) of the Labor-Management Relations Act should not be at hazard in an exercise in legal gamesmanship.

II.

Respondent's Argument On the Merits Is Largely Based Upon Matters Outside the Record.

Only one facet of Respondent's argument on the merits —its characterization of the alleged strike—need be discussed. While the effects of any alleged strike are for the arbitrator, and not a court, to determine, Petitioner believes it important to point out that Respondent's statements as to the length of the claimed strike, and thus a substantial part of its argument, are based upon matters *dehors* the record.

In Respondent's Brief, reference is made to an alleged "prolonged strike", one which assertedly "is still going on". An attempt is even made to distinguish *International Moulders* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (C.A. 3d 1960), which is clearly in point, on the basis, at least in part, of the duration of the strikes. On this view, a "short" strike would not bar arbitration, while a "prolonged" one would.

Respondent's claim is totally without support in the record. At no point is there either an admission or an undenied allegation as to the duration of the asserted strike. Respondent's allegations as to the length of the strike (R. 44) are specifically denied by Petitioner (R. 49). As Justice Thornton, dissenting, noted (Pet. App. p. 17):

> "The pleadings in this case should not be construed to hold that a violation of the no-strike clause is admitted or stands undenied."

While the Iowa Supreme Court's opinion does say (Pet. App. p. 12) that the employees walked out and are still refusing to return to their jobs, this is no more than a gratuitous observation based upon no evidence whatever.

Further, Respondent's Brief mentions an alleged refusal by the employees to return to work on May 15, 1961 and the asserted treatment by Respondent of such refusal as the termination of employment of the employees—in other words, as tantamount to discharge. Thus, even on Respondent's own theory of the events, the alleged strike could only have lasted at most for four days—from May 11 to May 15. Following the latter date, the employees could not have been on strike; whatever picketing may have occurred thereafter could only have been to protest the discharges.

All such matters, of course, relate to the merits, or lack of merits, of the grievances. The arbitrator should hear them, not this Court or the Iowa courts.

Conclusion.

For the reasons urged in the Petition and in this Reply, Petitioner prays that the Petition be granted.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, FRUCHTMAN & WATT,
105 West Adams Street,
Chicago 3, Illinois

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa,
Of Counsel.

June 11, 1963.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
SEP 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY d/b/a SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF FOR PETITIONER.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago 3, Illinois,
HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa.

THE SHERWOOD-KLEIDER PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement of the Case	3
The Pleadings	3
Ruling of the Trial Court	5
Decision of the Supreme Court of Iowa	6
Summary of Argument	8
Argument:	
I. In holding that Petitioner "waived" its right to arbitrate by violating the no-strike clause, the Iowa courts usurped the functions of the arbitrator	12
A. A court may not consider the merits of an arbitrable grievance	12
B. Allegations concerning an alleged breach of the no-strike clause relate to the merits of the grievances	14
C. The Courts of Appeals and District Courts have rejected the contention that a claimed violation of a no-strike clause bars arbitration	15
II. The Supreme Court of Iowa misconstrued this Court's "quid pro quo" language in Lincoln Mills	20
III. Even if there were any scope for judicial determination of the claim that the union violated the no-strike clause, the pleadings disclosed an issue which could not be resolved in the absence of evidence	22
IV. Filing unfair labor practice charges is not a waiver of the right to arbitrate	25
Conclusion	28

CITATIONS.

Cases.

Armstrong-Norwalk Rubber Corp. v. United Rubber Workers, Local 283, 167 F. Supp. 817 18

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U. S. 437 26

Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionary Workers, 370 U. S. 254 ..... 10, 17, 18, 21, 24

Glass Bottle Blowers Ass'n v. Arkansas Glass Container Corp., 183 F. Supp. 829 27

Independent Petroleum Workers v. Esso Standard Oil Co., 235 F. 2d 401 26

International Moulders and Foundry Workers v. Susquehanna Casting Company, 283 F. 2d 80 ..... 9, 15, 18, 25

International Union of Operating Engineers v. Gulf Oil Co., 262 F. 2d 80 26

Local 748, International Union of Electrical, Radio and Machine Workers v. Jefferson City Cabinet Co., 314 F. 2d 192 ..... 9, 17, 18

Machinists Lodge No. 12 v. Cameron Iron Works, Inc., 257 F. 2d 467 ..... 11, 26

Mastro Plastics Corp. v. NLRB, 350 U. S. 270 21

Retail Shoe Salesmen's Union, Local 410 v. Sears Roebuck & Co., 185 F. Supp. 558 27

Retail, Wholesale and Department Store Union, Local 1085 v. Vaughn's Sanitary Bakery, Inc., 196 F. Supp. 633 18

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U. S. 448 ..... 9, 12, 20

United Steelworkers of America v. American Manufacturing Co., 363 U. S. 564 ..... 8, 12, 13, 18, 24
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 ..... 8, 12
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574 ..... 8, 12, 13, 17, 18, 25
United Textile Workers of America, Local 120 v. Newberry Mills, Inc., 315 F. 2d 217 16

UNITED STATES STATUTES.

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185(a) 2, 3, 12, 13, 14, 23
Section 10(a) of the National Labor Relations Act, 29 U. S. C. § 160(a) 27
Section 203(d) of the Labor-Management Relations Act of 1947, 29 U. S. C. § 173(d) 27

MISCELLANEOUS.

Rule 105, Iowa Rules of Civil Procedure 4
6 Corbin, Contracts, § 1443 (1961 Supp.) n. 34, pp. 192-93 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,
Petitioner,

vs.

NEEDHAM PACKING COMPANY d/b/a SIOUX CITY DRESSED BEEF, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The unreported opinion of the Woodbury District Court (technically, under Iowa procedure, a Ruling on Points of Law) is reprinted at pages 42-50 of the Transcript of Record (hereinafter designated "R"). The opinion of the Supreme Court of Iowa is reported at 119 N. W. 2d 141; it is reprinted at R. 55-60.

JURISDICTION.

The judgment of the Supreme Court of Iowa was rendered on January 15, 1963 (R. 55). The petition for a writ of certiorari was filed on April 6, 1963 and granted on June 17, 1963 (R. 62). The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

The following questions are presented:

(1) Does a court usurp the function of the arbitrator when it decides, in a suit to compel arbitration under Section 301(a) of the Labor-Management Relations Act of 1947, that a walkout assertedly in violation of a no-strike clause in a collective bargaining agreement amounts to a waiver by the union of its right to arbitrate under the agreement?

(2) In a suit under Section 301(a) to compel arbitration, may a court properly decide, on the pleadings alone, that under federal law a walkout violated a no-strike clause even though the union expressly denied any violation?

(3) In suit under Section 301(a) to compel arbitration of employee discharge grievances, does the court exceed its power and determine the merits—*i.e.*, that participation in a walkout was just cause for the discharges—when it decides that the claimed walkout violated the no-strike clause?

(4) Does the filing of unfair labor practice charges with the National Labor Relations Board constitute a waiver by the union of its contract right to arbitrate the separate issue of whether discharges were for just cause within the terms of the collective agreement?

STATUTE INVOLVED.

The statutory provision involved is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Sec. 185(a), which reads as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE.

The Pleadings.

Petitioner, a labor organization representing employees of Respondent, filed a petition in equity in the District Court of Woodbury County, Iowa to compel Respondent to arbitrate two grievances which had arisen under a collective bargaining agreement between the parties.* The petition, which was filed on August 26, 1961, invoked the state court's concurrent jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947 (R. 1-6).

The petition charged Respondent with violating the collective bargaining agreement (R. 7-21) by refusing to submit the grievances to arbitration. The grievances themselves, copies of which were attached to the petition, complained that Respondent had improperly discharged certain employees and demanded their reinstatement with pay for time lost and restoration of full seniority rights. One grievance, designated 1-A, protested the improper discharge of one employee (R. 3, 22), while grievance 2-A complained of the discharge of approximately 190 other employees (R. 3, 23). The petition alleged that all 191 employees were discharged in violation of certain provisions of the agreement, including a provision which limits Respondent's right to discharge to instances where "just cause" for such penalty exists (R. 3-4).

Respondent filed an answer and counterclaim and pleaded

* Section 33(c)(5) of the agreement provides as follows (R. 19): "In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation or application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union . . . Said Arbitration Board shall have authority only to interpret and apply the provisions of this contract." There is no express language in the agreement excluding any class of disputes from the coverage of this arbitration provision.

certain legal and affirmative defenses (R. 30-34). Among its affirmative defenses, Respondent alleged, with respect to grievance 1-A, that Petitioner had refused to proceed beyond steps 1 and 2 of the five-step grievance procedure and had, instead, "caused a work stoppage and strike" which constituted "a waiver of any right to proceed further" with grievance 1-A (R. 32). With respect to grievance 2-A, involving the 190 employees, Respondent asserted that the 190 grievants "voluntarily struck" in violation of the contract's no-strike clause and "by their own election ceased to be employees of the defendant or to be entitled to the benefits of grievance and arbitration procedure, or any other provisions of the contract" (R. 32).

In its reply, Petitioner expressly denied that it had caused or authorized any strike or walkout (R. 34), denied that it had refused to proceed further with grievance 1-A (R. 35), and maintained that allegations with respect to a strike in violation of the no-strike clause and the union's waiver of its right to arbitrate related to the merits of the grievances and might be considered only by the arbitrator (R. 34, 35, 36). Petitioner admitted that on the day in question, May 11, 1961, "certain employees" (not the entire 191 who were discharged) left their jobs, but alleged that such action was without Petitioner's authorization and that those employees "were compelled to leave their work by reason of the [Respondent's] repeated and then existing prior breach of the collective bargaining agreement" (R. 34).

Petitioner at no time admitted that a "strike" had occurred and expressly denied a breach of the no-strike clause either on its own part or on the part of any employees (R. 34, 35, 36).

On January 10, 1962, Respondent filed an application, pursuant to Rule 105 of the Iowa Rules of Civil Procedure,

asking the court to hear and determine points of law raised in the pleadings (R. 41-42). The application asked the court to rule that Petitioner was not entitled to compel Respondent to arbitrate for the reasons that: (1) under Iowa law and procedure the court could not specifically enforce an executory agreement to arbitrate; (2) Petitioner had "waived" its right to enforce the grievance and arbitration provisions of the agreement (a) by "bringing an action before the NLRB to enforce its claimed rights", and (b) by "engaging in a 'walkout' in violation of the contract"; and (3) the notice of grievance was not timely.

Ruling of the Trial Court.

In a ruling on February 13, 1962, the trial court sustained all of Respondent's contentions except the third, which the court stated could not be determined upon the pleadings alone (R. 42-50).* The court rejected the contentions of Petitioner (1) that federal law, and not state law, applied; (2) that Respondent's allegations with respect to the alleged walkout related to the merits of the grievances and that under federal law the effect, if any, of any walkout was a matter to be determined by the arbitrator and not by the court; and (3) that filing unfair labor practice charges with the NLRB did not waive the contractual right to arbitrate.

Specifically, the trial court held *that Iowa law and not federal law applied;* that under Iowa law an executory agreement to arbitrate was not enforceable in equity; that filing unfair labor practice charges constituted a waiver of

* With respect to the timeliness of the grievances, Petitioner had argued that the determination of Petitioner's compliance with the procedural steps of the grievance procedure was a matter for the arbitrator, not the court, to consider. The trial court's ruling suggests the possibility of an inquiry into matters of fact on the issue of timeliness should the case be remanded to that court for further consideration.

the contractual right to arbitrate; and that the strike, assertedly in violation of the "no-strike" clause (notwithstanding Petitioner's specific denials both as to the occurrence of a strike and as to violation of the no-strike clause), also amounted to a "waiver" of the right to arbitrate (R. 42-50). The court's rulings were made solely on the basis of the pleadings and argument, without the benefit of testimony or other evidence.

The rulings of the trial court amounted to a complete adjudication of Petitioner's rights and had the effect of dismissing the petition on matters of law. All that remained for adjudication in the trial court was Respondent's counterclaim for breach of contract for damages claimed to have been occasioned by the strike.

Decision of the Supreme Court of Iowa.

Petitioner promptly applied to the Supreme Court of Iowa for an order permitting an interlocutory appeal (R. 51-54), which application was granted (R. 54). On January 15, 1963, the Supreme Court of Iowa affirmed the lower court (R. 55-60).

The Supreme Court of Iowa held that Petitioner "waived its right to arbitrate" by the alleged walkout in violation of the no-strike clause (R. 59). Notwithstanding the state of the pleadings, the Iowa Court stated (R. 58): "In the instant case we are squarely faced with [the] issue of a waiver of [the] right to arbitrate because of [a] breach of [the] no-strike clause." The court also wrote (R. 59):

> We think the "quid pro quo" view advanced in the Lincoln case [*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957)] is the sound and sensible rule to adopt. . . . We think the trial court was correct in holding the *Union* had waived its right to arbitrate the grievances filed by *its* walkout. [Emphasis supplied.]

One Justice dissented, stating: "What I believe to be the error in the majority opinion is holding that once an evidence of a violation of a no-strike clause appears the parties are no longer required to arbitrate" (R. 60).

The majority opinion also contained the following observation (R. 59): "Two other matters are urged but we find no merit therein and make no comment thereon." In addition to the matters which the Iowa Court expressly decided,* Petitioner had urged as error only one further ruling of the trial court, namely, its determination that filing an unfair labor practice charge with the National Labor Relations Board waives contractual rights to arbitrate. Since the Iowa Court's cryptic reference to "two other matters" must have included Petitioner's appeal from the lower court's finding on the question of "waiver" by filing charges and must have been intended as an affirmance of the lower court's ruling on this issue, Petitioner has felt compelled to argue the question in this Court.

---

* Respondent conceded before the Iowa Supreme Court that the trial court erred in ruling that state law applied; that Court acknowledged that federal law governed (R. 57), as Petitioner had urged from the outset of the case.

SUMMARY OF ARGUMENT.

I.

In determining whether or not a dispute should be submitted to arbitration, in a suit to compel a party to arbitrate, the role of a court is limited. Its function is to decide whether the grievance sought to be arbitrated makes a claim, which, *on its face,* is governed by the contract; if so, the duty of the court is to order the dispute submitted to the arbitrator, in accordance with the parties' agreement, for a determination on the merits. Any inquiry by the court into the merits, even in the process of interpreting the arbitration clause, is error, for only the arbitrator is entitled to determine the merits. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The Iowa courts necessarily decided the merits when they held that the alleged walkout constituted a waiver of the union's right to arbitrate. The grievances advanced by Petitioner claim that the discharges were in violation of the collective bargaining agreement. In view of Respondent's assertion that the walkout was in violation of contract, a dispute is presented as to whether participation in the alleged walkout constituted just cause for the discharges. This is a dispute the arbitrator must resolve and, in so doing, he must decide other related questions, such as whether there was justification for the employees' actions.

These questions necessarily involve the merits. The Iowa courts, by holding that the union waived its right to arbi-

trate by reason of the claimed strike, thus passed upon the very questions the arbitrator should decide. The Iowa courts failed to recognize that the question of whether or not there had been a violation of the no-strike clause was a question of contract interpretation and that, under the collective bargaining agreement, the parties had agreed that only the arbitrator should determine such questions.

The federal Courts of Appeals and District Courts, unlike the Iowa courts, have uniformly held that a claimed breach of a no-strike clause does not prevent the union from obtaining arbitration. Some of the courts have expressly recognized that discharges for participation in a strike claimed to be in violation of the agreement are arbitrable. In so deciding, these courts have rejected the argument, advanced by Respondent and accepted by the Iowa courts, that the union by its actions has waived or repudiated its right to arbitrate. *International Moulders and Foundry Workers* v. *Susquehanna Casting Company*, 283 F. 2d 80 (C.A. 3d 1960); *Local 748, International Union of Electrical, Radio and Machine Workers* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (1963).

Even if the Petitioner here admitted that it had violated the no-strike clause—and Petitioner has denied any violation—the disputes presented by the grievances should have been submitted to arbitration.

II.

In large part the Iowa Court's difficulty arises from its misinterpretation of this Court's language in the *Lincoln Mills* case, 353 U. S. 448, 455 (1957), where this Court stated that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." The Iowa Court concluded that this language means that arbitration clauses and no-strike provisions are mutually dependent.

Thus, on the Iowa Court's view, any walkout contrary to a no-strike clause would preclude arbitration of the propriety of any discharges occasioned by the walkout. This Court, however, has plainly stated that there is no such rigid rule. *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 261 fn. 7 (1962). The agreement to arbitrate all disputes, without excluding those involving action by the union contrary to a no-strike clause, indicates that the parties did not make arbitration dependent upon the absence of strikes. An alleged strike is not automatically a repudiation of the arbitration provisions of the agreement.

Furthermore, the Iowa Court overlooks the fact that the employer retains his remedy for violation of the no-strike clause: he is still free to sue for damages, as Respondent has done here by way of counterclaim.

III.

Even if there were scope for judicial inquiry into the claim that the union had violated the no-strike clause, a determination of that issue would require a consideration of the facts. Here, however, the Iowa courts simply assumed the facts to be what they said they were, despite express denials by Petitioner of any breach of the no-strike clause. The pleadings disclosed a dispute as to whether or not a strike had taken place and, if it had, whether there was justification for it. Justice Thornton, in dissenting, recognized that it was improper for the majority of the Court simply to assume that there had been a violation of the no-strike clause.

This assumption by the Iowa Court tends to emphasize the danger of judicial intrusion into areas reserved for arbitrators. The Iowa Court did not consider, and could not have considered, any of the important circumstances

bearing upon the claim that the union had repudiated the contract and had thus forfeited its right to arbitrate. These circumstances are virtually identical to the merits of the grievances themselves. They are matters which are best left to the processes of arbitration under the parties' agreement to arbitrate.

IV.

The filing of charges with the NLRB did not constitute a waiver of the union's right to arbitrate, and, insofar as the Iowa Supreme Court may be considered so to have held, its conclusions are erroneous. Resort to the NLRB and the use of arbitration machinery under a collective bargaining agreement involve quite separate rights; these rights are not mutually exclusive, and there is no applicable doctrine of election of remedies.

The National Labor Relations Board is concerned with acts which constitute unfair labor practices. In the case of an employee discharge, it can only determine whether or not the discharge was contrary to the Act. It cannot decide the separate question of whether there was "just cause" for the discharge under the collective bargaining agreement. Only an arbitrator empowered by the parties to make such a decision can do so.

There is nothing to prevent the same act from constituting an unfair labor practice and, at the same time, a violation of the contract between the parties. A party claiming to be aggrieved may seek two remedies: one for the unfair labor practice, a remedy which is available through the NLRB; and the other for violation of contract, a remedy which, if the contract provides for arbitration, the party seeks from the arbitrator. *Machinists Lodge No. 12 v. Cameron Iron Works, Inc.*, 257 F. 2d 467 (C.A. 5th 1958), cert. den. 358 U. S. 880.

ARGUMENT.

I.

IN HOLDING THAT PETITIONER "WAIVED" ITS RIGHT TO ARBITRATE BY VIOLATING THE NO-STRIKE CLAUSE, THE IOWA COURTS USURPED THE FUNCTIONS OF THE ARBITRATOR.

A.

A Court May Not Consider the Merits of an Arbitrable Grievance.

Since 1957 this Court has consistently recognized that federal labor policy favors arbitration as the optimum means of settling disputes under collective bargaining agreements. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448. Contract arbitration provisions have therefore been regarded as essential devices for preserving industrial peace. *Lincoln Mills* held not only that such arbitration clauses were enforceable under Section 301(a), but that they were to be enforced under a uniform body of substantive federal law which the courts were to "fashion from the policy of our national labor laws" 353 U. S. 448, 456. Thus, contrary to the widespread state-law rule (applied by the trial court in this case) that executory agreements to arbitrate will not be enforced in equity, arbitration clauses in collective agreements are enforceable under federal law derived from Section 301(a).

Moreover, since the arbitration clause in a labor agreement is designed to accomplish a unique purpose, the role of a court, called upon to enforce such a provision, is likewise unique. In the *Steelworkers* trilogy of 1960, *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, this Court delineated the boundaries of judicial in-

quiry in a suit under Section 301(a) to compel a reluctant party to arbitrate. In such a cause, a court may not consider the merits of the grievance which the plaintiff seeks to arbitrate, even in determining the threshold question of arbitrability.

As expressed in the *American Manufacturing Co.* decision, 363 U. S. 564, 568-69:

> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values [of] which those who are not a part of the plant environment may be quite unaware.
>
> . . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

The Court was equally explicit in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.

Further, in *Warrior & Gulf*, at 363 U. S. 574, 585, the Court warned against attempts to persuade judges "to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator".

Thus the place of arbitration in the scheme of the federal labor laws requires that a court decline to consider the merits of a grievance in a suit under Section 301(a) to compel arbitration. It is this important principle which should determine the result in the present case.

B.

Allegations Concerning an Alleged Breach of the No-Strike Clause Relate to the Merits of the Grievances.

In holding that the alleged walkout constituted a waiver of the right to arbitrate, the Iowa courts went to the very heart of the merits of Petitioner's grievances. Those grievances assert that Respondent discharged certain employees in violation of the collective bargaining agreement (R. 22-24). Respondent claims that the employees terminated their employment by participating in an alleged walkout and that such strike action "waived" the union's right to arbitrate (R. 30, 32, 41).

Thus there is a fundamental dispute as to the effect of the asserted strike. The issue fairly posed by the grievances and Respondent's defense is whether participation in the alleged strike constituted just cause for discharge. There are also other, closely-related questions for the arbitrator to consider, such as: What employees, if any, actually engaged in a walkout? Was resort to such action permitted under the no-strike clause because of prior acts of the company contrary to its contract obligations? Was discharge the proper penalty even if just cause for *some discipline* existed?

These questions comprise the merits. It was virtually impossible for the courts below to decide that the asserted strike waived the right to arbitrate without intruding upon them. The acts said to constitute the waiver and the acts

justifying the discharges are, realistically, inseparable. When the Iowa courts presumed to decide the question of whether the union had lost its right to arbitrate, they determined the issues which the arbitrator would be called upon to decide.

Viewing this error from another vantage point, the Iowa courts failed to recognize that, under applicable federal law, the issue they decided—whether or not the employees violated the no-strike clause—is a question of contract interpretation, a question which the parties had agreed an arbitrator should determine. The arbitration clause, Section 33(c)(5) of the agreement, provides, without limitation of any kind, that disputes "with reference to the proper interpretation or application of the provisions of this contract" are to be submitted to arbitration (if not settled in preceding steps of the grievance procedure) (R. 19). When the Respondent alleges, and Petitioner denies, that the no-strike clause was violated, an issue is presented as to the "interpretation or application" of the agreement. The contract prescribes that that issue be submitted to arbitration.

C.

The Courts of Appeals and District Courts Have Rejected the Contention That a Claimed Violation of a No-Strike Clause Bars Arbitration.

Particularly since the *Steelworkers* cases, the federal courts have uniformly held that the claim of a walkout in violation of a no-strike clause is not a defense to a suit to compel arbitration. One of the leading decisions is *International Moulders and Foundry Workers* v. *Susquehanna Casting Company*, 283 F. 2d 80 (C. A. 3d 1960). Under circumstances similar to those involved here, the

court recognized that it was bound to submit the controversy to arbitration, writing, at 283 F. 2d 80, 81:

> The Union's grievance consists of the discharge of some thirty employees by the Company. Under Article IV of the contract the right to discharge for "proper cause" is vested in the Company. The Union's claim, which it wishes arbitrated, is that the discharge was not for proper cause. The company says, however, that the no-strike provision which appears in Article V of the contract was violated and, therefore, the discharge was proper, that the Union broke the contract and no arbitration can be properly called for.
>
> • • • • •
>
> *The fact that the Company alleges that there was a violation of the contract by the Union quite clearly does not relieve it from the responsibility of arbitrating the propriety of the discharges here in question.* As pointed out by the Supreme Court in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* . . . , we must not confuse the scope of the labor-management contract with rules applicable to commercial contracts however well settled in that area.
>
> There certainly was a grievance in this instance, namely, the discharge of thirty men claimed by the Union not to be a proper one. It is admitted by the Union that on one day some men did leave their work for at least a portion of a day. Whether that leaving was justified by the circumstances is a question for the arbitrator. If it was not justified, there is a further question of whether the drastic remedy of discharge of these men was a proper one under the terms of the contract. In other words, this case is one precisely suited to the arbitration process under the agreement that the parties have made. [Emphasis supplied.]

More recently, in *United Textile Workers of America, Local 120* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C. A. 4th 1963), the employer, in a motion to dismiss, contended that it had been relieved of any obligation to arbitrate

employee discharges by reason of a breach of a no-strike clause—the very action which resulted in the discharges. Relying upon this Court's decisions in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), the court rejected the employer's arguments as to waiver and estoppel and affirmed the district court's grant of summary judgment directing arbitration. In explaining its decision, the Court of Appeals wrote, at 315 F. 2d 217, 219:

> In resolving doubts "in favor of coverage," the courts have been instructed that the parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used. It cannot be said with "positive assurance" that this arbitration agreement does not comprehend the discharges that are being contested. That is, since discharges for engaging in strikes have not been explicity excluded from the coverage of the arbitration agreement, we are not persuaded that the discharges in issue are not "[g]rievances arising out of the operation and interpretation of this [collective bargaining] agreement involving wages • • • hours, or other conditions of employment • • •." Surely, adopting a liberal interpretation of the language, as directed by the Supreme Court, the discharges are grievances as defined by the agreement.

In dealing with the claim that the union had waived its right to arbitrate, even if the grievances were arbitrable, the *Newberry Mills* court concluded that *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), disposed of that argument.

The Court of Appeals for the Sixth Circuit has also rejected the defense of waiver or repudiation of the right to arbitrate the discharge of strikers under circumstances much like those here. *Local 748, International Union of*

Electrical, Radio and Machine Workers v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (1963). In the *Jefferson City* case, the union apparently did not question the employer's claim that the striking employees had violated the no-strike clause in the agreement. The court observed that *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960), *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), and *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254 (1962), "sustain the Union's demand of arbitration."

Several district courts have also considered, and rejected, employers' claims that a strike in violation of a no-strike clause bars the arbitration of discharges resulting from the strike. The facts in *Retail, Wholesale and Department Store Union, Local 1085* v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M. D. Pa. 1961), are virtually identical to the facts alleged by Respondent. There the employer discharged a group of employees on November 2, 1960; the other employees walked out the following day. The employer then discharged the latter employees. The union filed an action to compel arbitration of the discharges; the employer filed a motion for judgment on the pleadings, alleging that the union's "members refused to and did not report for work and commenced a strike" and that the union was estopped from seeking arbitration. The court denied the employer's motion for judgment, relying upon *Susquehanna Casting Company*, 283 F. 2d 80 (C. A. 3d 1960), and the *United Steelworkers* cases, *supra*.

In *Armstrong-Norwalk Rubber Corp.* v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. Conn. 1958), appeal dismissed 269 F. 2d 618 (C. A. 2d 1959), the issue arose in a converse context. In that case, when the employer discharged the union's president, the union called

a strike to enforce its demand that its president be reinstated. The strike, according to the court's opinion, lasted five weeks and "substantially stopped production at the employer's plant". The employer filed a suit to stay the arbitration which the union demanded. As the court characterized the employer's position, at 167 F. Supp. 817, 818:

> It is the legal consequences of this strike which is the major issue in the present action. The employer has sued to stay arbitration of the Clayborne discharge on the theory that the strike was a repudiation of the no-strike provision of the collective bargaining agreement which forfeited the right of the union to invoke arbitration and freed the employer of any obligation to arbitrate the matter of Clayborne's discharge.

In granting the union's motion to stay the employer's action pending arbitration, the court concluded, at 167 F. Supp. 817, 821:

> Not only was the Clayborne discharge arbitrable here, *but the effect of a claimed breach of the no-strike clause of the contract was arbitrable as well.* [Emphasis supplied.]

In the present case the Iowa courts decided the merits under the guise of determining whether certain alleged conduct of Petitioner's members relieved the employer of its obligation to arbitrate. Even if a breach of the no-strike clause had been admitted, the Iowa courts should have submitted the dispute to arbitration.

II.

THE SUPREME COUT OF IOWA MISCONSTRUED THIS COURT'S "QUID PRO QUO" LANGUAGE IN LINCOLN MILLS.

The decision of the Iowa Supreme Court is largely attibutable to its misinterpretation of what it terms the "*quid pro quo* rule." The Iowa Court stated its view as follows (R. 58-59):

> Whether the "quid pro quo" rule will be followed to the extent of declaring a breach of a no-strike clause constitutes a waiver of rights to arbitrate under the agreement, depends upon the view to be taken of Section 301(a), supra. Clearly, under said rule work stoppage by strikes, etc., is not conducive to economic tranquility and progress. If the view is taken that a strike is merely another incident or grievance which should be decided as are other contract violations, it would seem the Company has relinquished many valuable rights and received nothing in return and arbitration agreements will be shied away from. In fact the purpose of Section 301(a) will be entirely emasculated. If, on the other hand, the view is taken that a no-strike clause means what it says and that if the Union has the right to require arbitration of differences arising between it and the Company then the Company has a similar right to have the Union abide by its agreement we are well along the road to labor and management tranquility. It "should not have its cake and eat it too". *We think the "quid pro quo" view advanced in the Lincoln case* [*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 455 (1957)], *supra, is the sound and sensible rule to adopt.* [Emphasis supplied.]

The reference to *Lincoln Mills* is obvious: "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." 353 U. S. 448, 455 (1957).

The Iowa Court's view that arbitration and no-strike provisions are mutually dependent has not been accepted by this Court. Such a view would mean that each and every walkout in the face of a no-strike clause would preclude arbitration of discharges resulting from the walkout, irrespective of the circumstances. Instead, this Court has emphasized that there is "no . . . inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation." *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 261 (1962). In this case, as in *Drake Bakeries*, 370 U. S. 254, 262, it may be said that "by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise."

Moreover, the Iowa Court's somewhat mechanical view is inconsistent with this Court's decision in *Mastro Plastics Corp.*, v. *NRLB*, 350 U. S. 270 (1956), which recognizes that not all strikes violate no-strike clauses. To the Iowa Court, the circumstances of the alleged breach are of no significance; to this Court, however, "the circumstances of the claimed repudiation are critically important." *Drake Bakeries, Inc.* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 262-3.

The Iowa Court's quaint homily that the union "should not have its cake and eat it too" (R. 59) evidences a mistaken belief that, if the union did violate the no-strike clause, it would emerge without penalty were the company ordered to arbitrate. What this view overlooks, however,

is that the company has its remedy in damages for any violation of the no-strike clause. Here Respondent has filed its counterclaim for damages, and even if compelled to arbitrate Respondent may press its claim for damages for breach of contract. Each party clearly has a contract remedy for violations by the other.

III.

EVEN IF THERE WERE ANY SCOPE FOR JUDICIAL DETERMINATION OF THE CLAIM THAT THE UNION VIOLATED THE NO-STRIKE CLAUSE, THE PLEADINGS DISCLOSED AN ISSUE WHICH COULD NOT BE RESOLVED IN THE ABSENCE OF EVIDENCE.

The Iowa Supreme Court's conclusion that Petitioner violated the no-strike clause in the collective bargaining agreement not only usurps the function of the arbitrator, it does so by assuming unproved facts.

In its affirmative defenses, Respondent alleged that Petitioner "and its members struck against defendant" and set up a picket line, and that said "strike was contrary to" the provisions of the no-strike clause (R. 31); that Petitioner "caused a work stoppage and strike", thereby waiving any right to proceed further with Grievance 1-A, which had been processed through Steps 1 and 2 of the grievance procedure (R. 32); and that the aggrieved employees under Grievance 2-A "voluntarily struck" in violation of the no-strike clause and thus ceased to be employees or entitled to any benefits of the agreement (R. 32).

In its reply, Petitioner denied that it authorized any walkout, admitting merely that certain employees (not the entire group discharged) left their jobs on the day in question (R. 34). Further, Petitioner alleged that those employees who did leave their jobs were compelled to do so "by reason of the repeated and then existing prior breaches

of the collective bargaining agreement" by Respondent (R. 34).

Petitioner denied every allegation that the no-strike clause had been violated (R. 35, 36). Moreover, it asserted repeatedly that questions as to claimed breaches of the agreement had to do with the merits of the grievances and therefore could be determined only by the arbitrator (R. 34, 35, 36).

In the light of these conflicting allegations, it is difficult to see how the Iowa Court could have decided that "the Union had waived its right to arbitrate the grievances" (R. 59), except by completely ignoring Petitioner's pleadings. Even if it were proper for the court (instead of the arbitrator) to decide questions as to an asserted breach of the no-strike clause, such a judicial decision could not properly have been made on the record here. A real conflict was disclosed by the pleadings; the Iowa Court quite obviously reached its decision by assuming that the facts were what it said they were.

Justice Thornton, dissenting, recognized that the view of the majority was not supported by the record; he wrote (R. 59):

> I respectfully dissent. The pleadings in this case should not be construed to hold that a violation of the no-strike clause is admitted or stands undenied. The question is not ready for decision under rule 105, Rules of Civil Procedure.

The Iowa Court's determination of a factual controversy in a ruling on the pleadings underscores the dangers inherent in a court's undertaking to inquire into matters best left to an arbitrator's judgment. The dissenting Justice commented that the majority opinion goes far beyond the permitted scope of inquiry in a suit under Section 301(a) to compel arbitration (R. 60):

> Further, the parties have agreed on a tribunal for

the determination of questions arising, "with reference to the proper interpretation or application of the provisions of this contract." This provision is not a narrow one. It includes the no-strike clause. The fact that arbitration may be instigated only at the request of the union should not be determinative. The company has so agreed. Whether or not there has been a violation of the no-strike clause is proper for the arbitrators to consider in determining the grievance. A waiver would go to the merits of that question.

Having before it only the pleadings in the case, the Iowa Court could not have considered the circumstances of the claimed walkout, the justification for such action, the number of employees involved, the duration of their walkout, Petitioner's responsibility, or any of the other factors bearing directly on the alleged waiver of the right to arbitrate. The Iowa Court thus considered none of the "circumstances of the claimed repudiation" viewed by this Court to be "critically important". *Drake Bakeries, Inc. Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 262-63 (1962); nor could it weigh the "character" of the repudiation deemed controlling by Professor Corbin. 6 Corbin, *Contracts*, § 1443 (1961 Supp.) n. 34, pp. 192-193.

Although the circumstances of any claimed "repudiation" are vitally important, it does not follow that a court should consider them. Where the discharges in dispute result from an alleged work stoppage and the union claims that there was justification for such walkout as did occur, the "critically important" circumstances are all but inseparable from the merits of the grievances themselves. The facts justifying the walkout "may assume proportions of which judges are ignorant." *United Steelworkers of America* v. *American Manufacturing Company*, 363 U. S. 564, 567 (1960). A determination may require reference to the "industrial common law—the practices of the industry

and the shop." *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574, 582 (1960). In short, resolution of the disputed issues concerning the asserted breach of the no-strike clause is a function "precisely suited to the arbitration process under the agreement that the parties have made". *International Moulders and Foundry Workers* v. *Susquehanna Casting Company*, 283 F. 2d 80, 81 (1960).

IV.

FILING UNFAIR LABOR PRACTICE CHARGES IS NOT A WAIVER OF THE RIGHT TO ARBITRATE.

Insofar as the Iowa Supreme Court may be presumed to have affirmed the trial court's holding that filing unfair labor practice charges with the National Labor Relations Board constituted a waiver of the union's right to arbitrate, its conclusions are clearly erroneous. Resort to the NLRB and the use of the grievance and arbitration provisions of a collective bargaining agreement involve the exercise of wholly separate and distinct rights. The exercise of one right in no way precludes the other.

The arbitration of grievances constitutes a means for the voluntary settlement of disputes between parties to collective bargaining agreements. An aggrieved party seeks a private remedy before the arbitrator for violation of the agreement.

The function and purpose of action by the National Labor Relations Board are totally different. The NLRB, as a federal agency created by statute, is empowered only to administer and enforce the provisions of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947. Specifically, in the case of an employee discharge, the Board can determine only whether the discharge violated the Act. The Board cannot and does

not determine the different question of whether there was "just cause" for the discharge within the meaning of a collective bargaining agreement. The latter question may be determined only by an arbitrator empowered by the contract between the parties to make such a determination. The Board has no jurisdiction to enforce collective bargaining agreements, and the violation of a collective bargaining agreement is not an unfair labor practice under the Act. *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 443 fn. 2 (1955).

The petition in the present case seeks to compel Respondent to arbitrate the question of just cause for the discharge of employees. No unfair labor practice is charged, for neither the arbitrator nor the court has jurisdiction to determine unfair labor practices. The only relief sought is for contract violations.

The same act may be both an unfair labor practice and a contract violation; a party may simultaneously seek remedies for both. *International Union of Operating Engineers* v. *Gulf Oil Co.*, 262 F. 2d 80 (C. A. 5th 1958); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F. 2d 401 (C. A. 3rd, 1956). In *Machinists Lodge No. 12* v. *Cameron Iron Works, Inc.*, 257 F. 2d 467, 472-73 (C. A. 5th 1958), cert. den. 358 U. S. 880, the court stated:

> However, the appellee overlooks the obvious distinction between *contract* provisions and *matters committed exclusively to the Board.* If an arbitrable contract provision encompasses unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the preemptive area. Likewise, the better reasoned cases hold that even where the aggrieved incident or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the Federal District Courts will not be deprived of the jurisdiction to grant

relief as to the breach of contract, the other aspect being left to the Board. However, in this case, we must go one-step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a "breach of contract *is not* an unfair labor practice"; the former is enforced by the courts, the latter by the Board . . . (Emphasis in original).

Other courts have recognized the distinct and separate character of grievance arbitration and unfair labor practice proceedings, and they have held that pursuing rights in one forum does not bar a party from pursuing other rights in the other forum, even where a union, seeking to compel an employer to arbitrate, has already filed unfair labor practice charges complaining of the same conduct involved in the grievance. *Glass Bottle Blowers Ass'n* v. *Arkansas Glass Container Corp.*, 183 F. Supp. 829, 830 (E. D. Ark. 1960); *Retail Shoe Salesmen's Union, Local 410*, v. *Sears Roebuck & Co.*, 185 F. Supp. 558 (N. D. Calif. 1960).

The view of the trial court, presumably approved by the Iowa Supreme Court, would have a crippling effect on industrial relations. The National Labor Relations Act specifically provides, in Section 10(a), 29 U.S.C. § 160(a), that:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . .

Section 203(d) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 173(d), provides further:

> Final adjustment by a method agreed upon by the

parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

These statutory admonitions that the Board's role is not affected by other remedial action and that private settlement of contract disputes is desirable are conclusive evidence of Congress' recognition that both the employer and the union should be able, at the same time, to seek arbitration *and* to invoke the Board's jurisdiction.

CONCLUSION.

For the foregoing reasons, Petitioner prays that this Court determine that the grievances set forth in the pleadings should be submitted to arbitration and reverse the decision of the Supreme Court of Iowa, remanding to that Court with instructions to return the cause to the District Court of Woodbury County, Iowa, for further proceedings in conformity with this Court's judgment and opinion.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago 3, Illinois.

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa.

TABLE OF CONTENTS

Item	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
1. *The Parties and the Collective Bargaining Agreement*	3
2. *The Walkout and Ensuing Strike*	5
3. *Proceedings Below*	7
Summary of Argument	8
Argument	14
I. The Judgment of Which Review Has Been Sought Is Neither Final Nor Complete	14
II. This Court Has Not Held That an Employer Will Always Be Compelled to Arbitrate the Breach of a No-Strike Clause	18
A. *Arbitration and No Strike Provisions: Meaningfully Correlative Clauses*	18
B. *Broad Arbitration Should Be the Policy But Not the Automatic and Inflexible Command*	21
III. The Court Below Correctly Held That Arbitration Was Not Required	23
A. *Respondent Was Relieved of Its Obligation to Arbitrate*	23
B. *The Presumption in Favor of Arbitration Is Rebutted in This Case*	28
C. *No Relevant Facts Are in True Dispute*	32
IV. Filing Unfair Labor Practice Charges Is Not a Waiver of the Right to Arbitrate	35
Conclusion	36

CITATIONS

Cases:

	Page
Armstrong-Norwalk Rubber Corp. v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. Conn., 1958); *app. dis.*, 269 F.2d 618 (2d Cir., 1959)	21
Atkinson v. *Sinclair Refining Co.*, 370 U.S. 238	passim
Bacon & Sons v. *Martin*, 302 U.S. 642	16
Bostwick v. *Brinkerhoff*, 106 U.S. 3, 4	14
Cincinnati Street R. Co. v. *Snell*, 179 U.S. 395	15
Cotton v. *Hawaii*, 211 U.S. 162, 170	14
Crescent Creamery v. *Milk Control Board*, 305 U.S. 559	16
Donnelly Garment Co. v. *Dubinsky*, 55 F. Supp. 587, 594 (W.D. Mo. 1944), affirmed, 154 F.2d 38 (8th Cir., 1946)	34
Drake Bakeries v. *Bakery Workers*, 370 U.S. 254	passim
Egan v. *Hart*, 165 U.S. 188	35
Gospel Army v. *Los Angeles*, 331 U.S. 543, 548	15
Grayson v. *Harris*, 267 U.S. 352, 357	13, 35
International Moulders and Foundry Workers v. *Susquehanna Casting Co.*, 283 F.2d 80 (3rd Cir., 1960)	21
International Union v. *Benton Harbor Malleable Industries*, 242 F.2d 536 (6th Cir., 1957)	24
Jefferson City Cabinet Co. v. *International Union*, 313 F.2d 251 (6th Cir., 1963), *cert. den.*, 373 U.S. 936	25, 26
Laclede Gas Light Co. v. *Public Service Commission*, 304 U.S. 398, 400	15
Local 748, International Union of Electrical Workers v. *Jefferson City Cabinet Co.*, 314 F.2d 192, (6th Cir., 1963)	21
Louisiana Navigation Co. v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101	14
Market Street R. Co. v. *R. R. Commission*, 324 U.S. 548, 551	14
Mastro Plastics v. *N.L.R.B.*, 350 U.S. 270	29

Page

Needham Packing Co., d.b.a Sioux City Dressed Beef, a Corporation v. *United Packinghouse, Food and Allied Workers, AFL-CIO Local No. 721, et al.* No. 83519 (Equity), the District Court for Woodbury County, Iowa 6

N.L.R.B. v. *Fresh'nd Aire Co.*, 226 F.2d 737 (7th Cir., 1955) 34

Paskvan v. *Mesich*, 227 F.2d 646 (9th Cir., 1955) 26

Republic Natural Gas Co. v. *Oklahoma*, 334 U.S. 62 ..... 14, 18

Retail, Wholesale Department Store Union, Local 1085 v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M.D. Pa., 1961) 21

Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69 15

Ruth & Clark v. *Emery*, 235 Ia. 131, 15 N.W.2d 896 ..... 9, 16

Sinclair Refining Co. v. *Atkinson*, 370 U.S. 195 ..... 10, 22

Textile Workers v. *Lincoln Mills*, 353 U.S. 448 ..... 9, 19, 22

United Garment Manufacturing Co. v. *Minnesota Joint Board*, 211 F. Supp. 414 (D. Minn., 1962) 11, 27

United Steelworkers of America v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 ..... passim

United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 22

United Textile Workers, Local 120 v. *Newberry Mills, Inc.*, 315 F.2d 217 (4th Cir., 1963), cert. den., 32 U.S. L.W. 3131 ..... 21, 26

Vulcan-Cincinnati, Inc. v. *United Steelworkers*, 289 F.2d 103 (6th Cir., 1961) 24

Statutes and Rules:

Rule 73, Iowa Rules of Civil Procedure 32

Rule 105, Iowa Rules of Civil Procedure 3, 8, 17

Rule 244(h), Iowa Rules of Civil Procedure 17

Rule 247, Iowa Rules of Civil Procedure 17

Rule 332(a), Iowa Rules of Civil Procedure 3, 15, 17

Rule 335, Iowa Rules of Civil Procedure 17

	Page
28 U.S.C. 1257(3)	2, 14
29 U.S.C. 152(5)	4
29 U.S.C. 185(a)	2, 4

Miscellaneous:

Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L.R. 1482, 1508-09 (1959)	29
Messer & Volz, Iowa Practice, (West, 1957), Vol. II, p. 363	16
Robert Lewis, *The Long Pause*, C. C. H. Labor Law Journal, March, 1963, p. 277	22
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed.), p. 196	35
Report of bargaining between General Electric Company and the Electrical Workers (IUE) of the Bureau of National Affairs Labor Relations Reports, Vol. 54	22

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO, *Petitioner,*

vs.

NEEDHAM PACKING COMPANY, d.b.a. SIOUX CITY DRESSED BEEF, A CORPORATION, *Respondent.*

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Woodbury County District Court is unreported and is printed at R. 42. The opinion of the Supreme Court of Iowa, including the dissenting opinion, has been reported at 119 N.W. 2d 141, and is printed at R. 55.

Jurisdiction

The judgment of which review is sought here was entered by the Supreme Court of Iowa on January 15, 1963 (R. 55). A petition for certiorari was filed in this Court on April 6, 1963, and granted on June 17, 1963 (R. 62).

Petitioner claims jurisdiction exists in this Court by vir-

tue of 28 U.S.C. 1257(3). For the reasons stated below, respondent contends that jurisdiction has been invoked prematurely. The decision of the Supreme Court of Iowa is not a final and complete judgment disposing of all elements of the present controversy between the parties.

Questions Presented

1. Whether a decision by the Iowa Supreme Court, under an interlocutory appeal procedure afforded by Iowa law, disposing of a federal issue raised by complaint and answer, but remanding the case for further proceedings, constitutes a final and complete order for purposes of review by this Court pursuant to 28 U.S.C. 1257(3), where the same issue passed upon by the Iowa Supreme Court is also involved in respondent's counterclaim awaiting hearing in the trial court.

2. Whether the decision of the Supreme Court of Iowa conflicts with applicable rulings of this Court, insofar as it held that a walkout by members of the petitioning union was such a breach of a no-strike clause in the collective bargaining agreement between the petitioner and the respondent company as to permit the respondent to terminate the contract, thereby relieving respondent of the duty of arbitrating alleged grievances arising subsequent to the walkout, after respondent had warned the petitioner and its members that respondent was terminating the collective bargaining agreement if petitioner's members refused to return to their jobs.

Statutes Involved

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), is set forth at p. 2 of petitioner's brief.

Rule 332(a) of the Iowa Rules of Civil Procedure provides in pertinent part that:

> "Any party aggrieved by an interlocutory ruling or decision, including one appearing especially whose objections have been overruled, may apply to the supreme court or any justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted after notice and hearing . . . on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness before trial on the merits will better serve the ends of justice. . . ."

Rule 105 of the Iowa Rules of Civil Procedure provides as follows:

> "The court may, in its discretion, and must upon application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal."

Statement of the Case

1. *The Parties and the Collective Bargaining Agreement.* The respondent is a corporation which operates a meat packing plant in Sioux City, Iowa (R. 2). It is engaged in an industry affecting commerce within the meaning of applicable provisions of the Labor Management Relations

Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner is a labor organization within the meaning of applicable provisions of the National Labor Relations Act, 49 Stat. 450, 29 U.S.C. 152(5), and of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a). The petitioner, a local union, maintains its principal place of business in Sioux City, Iowa (R. 1). The petitioner is an affiliate of the United Packinghouse, Food and Allied Workers, AFL-CIO (R. 1). The international union has an office and field representative at Des Moines, Iowa (R. 21).

On or about October 1st, 1960, the petitioner (Local Union No. 721) and the international union to which it belongs entered into a collective bargaining agreement with the respondent (R. 7-22). Under paragraph 2 thereof, the respondent recognized the international union and the petitioner "as the sole and exclusive bargaining agency for all the production employees employed by the Company," excluding certain categories of employees not pertinent here (R. 7).

The collective bargaining agreement between the parties provided in paragraph 9 thereof that, during the period of its existence, "the employees shall not engage in, and the Union shall not call or sanction, any slowdown, work stoppage, or strike, and no lockout shall be inaugurated by the Company." (R. 8-9).

The collective bargaining agreement also contained provisions covering the adjustment of grievances between the petitioner and the respondent (R. 18-20). Paragraph 33 (c)(5) thereof provided that "in the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall

be referred to a board of arbitration upon the request of the Union. . . ." (R. 19). No similar right to seek arbitration was afforded the Company under the contract. The collective bargaining agreement also required that any "grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance. . . ." If this procedure was not observed, the agreement provided that the grievance "shall be considered completely waived." (R. 19).

2. *The Walkout and Ensuing Strike.* On May 11, 1961, an employee of the respondent and a member of the petitioning union, Anton Stamoulis, left his job and refused to proceed under the grievance procedure by putting his grievance in writing as required by the collective bargaining agreement (R. 40). On that same day, May 11, 1961, 190 other employees, all members of Local No. 721, the petitioner herein, walked off their jobs (R. 41). This action was taken in the face of the respondent's warning that it would be considered a breach of contract (R. 41). The petitioner, the exclusive bargaining agent for petitioner's production employees, admitted in the trial court that employees represented by it "left their jobs at [respondent's] . . . plant on or about May 11, 1961." (R. 43). The trial court, after oral hearing and the filing of briefs (R. 42), but without the taking of evidence, found that there was "no substantial dispute here as to the facts" (R. 48); employees represented by the petitioner "did engage in a walkout" on May 11, 1961 (R. 44). The respondent denies, however, that it authorized any walkout by the 190 employees on May 11, 1961 (R. 34).

On May 12, 1961, respondent sent a letter to each of the 190 striking employees, advising them that their action in leaving their jobs was in violation of the contract between the union and itself. The letter also advised that

if they did not immediately return to work, their jobs would be filled by permanent replacements. The letter further informed the striking employees that the alleged cause of leaving their employment, the discharge of Stamoulis, would be processed as a grievance under the terms of the collective bargaining agreement (R. 41). On or about May 15, 1961, at a meeting of petitioner, Local 721 and its members unanimously rejected the offer of the respondent that they return to work and that the Stamoulis case be handled as a grievance, informing respondent of their rejection of its offer on or about May 15, 1961 (R. 41). The respondent treated this rejection as a termination of the employment of Stamoulis and the 190 other employees who had left their jobs on May 11, 1961 (R. 41).

The walkout and the strike which began on May 11, 1961 has continued to date, and picketing in front of the Company's premises has also been continuous since the first day of the walkout (R. 31). The petitioner, in its reply to the respondent's answer in the trial court, denied that it struck against the respondent, or, as alleged by the respondent, set up picket lines in front of the Company's premises. However, as previously stated, petitioner admitted that certain of its members within the bargaining unit represented by it did leave their jobs on or about May 11, 1961 (R. 34), and has not denied respondent's assertion that at a meeting of petitioner on May 15, 1961, these members rejected the offer of respondent that they return to work (R. 41).[1]

---

[1] In an unreported opinion and decree issued on July 15, 1961, in *Needham Packing Co., Inc., d.b.a. Sioux City Dressed Beef, a Corporation* vs. *United Packinghouse, Food and Allied Workers, AFL-CIO Local No. 721, et al.*, No. 83519 (Equity), the District Court for Woodbury County, Iowa, found that Local No. 721 had "advocated and participated," and certain of its officers and members had engaged in, "mass picketing, threats and violence and intimidation of employees" of the respondent. The Court

On July 5, 1961, a written grievance in behalf of Stamoulis was filed with the respondent, and on the same day a grievance protesting the discharge of 190 other employees was also submitted by the petitioner to the respondent (R. 22). On July 12, 1961, the respondent advised the petitioner's field representative that it was declining the request of July 5, 1961, to process the alleged grievances submitted, on the ground that the petitioner and its members by their conduct had repudiated and terminated the collective bargaining agreement of October 1, 1960 (R. 29).

3. *Proceedings Below.* On August 26, 1961, the petitioner filed a suit in equity in the District Court of Woodbury County, Iowa, invoking that Court's concurrent jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947 (R. 1-7). By its petition, the union sought a decree compelling the respondent to submit the grievances filed with the Company on July 5, 1961 to arbitration, allegedly in accordance with the provisions of the collective bargaining agreement (R. 7-21). The respondent answered and filed a counterclaim for damages in the amount of $150,000 for petitioner's breach of the contract of October 1, 1960. In addition, respondent pleaded certain affirmative and legal defenses (R. 30-34). One of the respondent's basic contentions was that petitioner and its members had engaged in a walkout and a strike, contrary to the no-strike clause of the collective bargaining agreement (R. 31). Respondent contended below, and asserts here, that the petitioner's "election of a strike" under the circumstances presented "constituted a waiver of any right" of the petitioner to proceed with the grievances which it had submitted on July 5, 1961 (R. 32). As stated above, petitioner denied

---

found that such mass picketing, threats, violence and acts of intimidation were "unlawful," and it thereupon issued an injunction against such acts, the injunction having remained in effect since that time.

that it had engaged in any strike action and asserted that "questions concerning any alleged waiver of [its] right to arbitrate . . . [concern] the merits of the grievance . . . and must be determined solely by the arbitrator. . . ." (R. 34-35). The petitioner did not request that proceedings under the counterclaim be stayed pending arbitration of the alleged grievances submitted on July 5, 1961 (R. 38-39), but asked that the counterclaim be dismissed (R. 39).

After the pleadings had been closed, the respondent made application to the trial court to rule upon three points of law, as permitted under Rule 105 of the Iowa Rules of Civil Procedure (R. 41-42). After a hearing on the application, the District Court of Woodbury County sustained the contentions raised by the respondent (R. 50). The petitioner promptly applied for and was permitted to take an interlocutory appeal to the Supreme Court of Iowa (R. 51-54). The Supreme Court affirmed the lower court in its decision of January 15, 1963, holding therein, with one Justice dissenting, that the petitioner had waived its right to arbitrate by a walkout in breach of the no-strike clause of the collective bargaining agreement (R. 55-60). The Supreme Court noted that it was "not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto." (R. 56).[2]

Summary of Argument

I

Respondent respectfully suggests that the writ of certiorari was improvidently granted and that the Court should not have assumed jurisdiction at this stage in the proceeding to review the decision below. The ruling of the Supreme

---

[2] 119 N.W.2d 141.

Court of Iowa is not a final or complete order, ripe for review at this time. Under Iowa procedure, the appeal which the petitioner took to the Supreme Court of Iowa was an interlocutory appeal, *Ruth & Clark* v. *Emery*, 235 Ia. 131, 15 N.W.2d 896. Respondent's counterclaim still awaits trial before the lower court which has not yet entered any order disposing of the entire controversy between the parties. If petitioner should prevail in the trial court and defeat the counterclaim by a showing that that strike or walkout was not in violation of the no-strike provision, applicable procedures are available under Iowa law on the basis of which petitioner could move either for a new trial on its original complaint or for reconsideration of the earlier ruling of law by the trial court. Actually, the decision of which petitioner has sought review in this Court is not *res judicata*, but rather has established only the law of the case and is subject to reconsideration by the Iowa courts at any time up to entry of a final judgment disposing of both the complaint and the counterclaim.

II

A. Petitioner argues, in effect, that the very existence of an arbitration petition in a collective bargaining contract in every instance obligates the employer to arbitrate all issues of alleged grievances of the union, regardless of the terms of the contract and whether or not the union has observed its contractual obligation not to strike. It is true that authoritative decisions of this Court have rejected an artificially rigid interpretation of the statement in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, that "the agreement to arbitrate grievance disputes is the *quid pro quo* is an agreement not to strike", and have required arbitration despite the occurrence of a walkout or strike, *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254. Nevertheless, the close

correlation of the arbitration and no-strike clauses has been repeatedly acknowledged by this Court. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238; *Drake Bakeries, Inc.* v. *Bakery Workers, supra.* These decisions, we believe, recognize that the parties to a collective bargaining agreement are at liberty to draft an arbitration provision as broad or as narrow as they deem suitable. We find nothing in these cases which lends support for the mechanical standard which the petitioner urges this Court to apply here and which would ignore completely the intimate relation of the arbitration and no-strike provisions of a collective bargaining contract.

B. Respondent respectfully suggests that if it be announced as the law that an employer is bound always to his agreement to arbitrate, whatever the terms of the agreement or the actions of the union, the very interests which the arbitration provision is intended to protect would be put in jeopardy. Employers "will pause long before committing themselves to obligations enforceable against them but not against their unions". *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 227 (dissenting opinion).

III

A. *Drake Bakeries* v. *Bakery Workers, supra,* sets forth the circumstances which will be looked to as determinative in deciding whether a union's breach of a no-strike provision has the effect of freeing the employer of a commitment to arbitrate grievances, or other disputes. These are: the terms of the arbitration provision itself; the attitude of the employer, following the alleged breach by the union, regarding the continuity of the contract; and finally, the seriousness of the breach, its nature and duration.

(1) The arbitration provision involved here, as the provision before this Court in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, provides solely for the processing of *employee* grievances but not those of the employer. So far as employer grievances are concerned, the respondent was free to pursue such other remedy as might be available and, indeed, the petitioner has conceded that no "claim for damages [for the petitioner's] alleged violation of a no-strike clause is the subject of grievances or otherwise before [the Court]. . . ." If the respondent did not bargain away its right to maintain an action for breach of the no-strike clause, surely this is additional significant evidence that the scope of the arbitration clause did not reach to embrace walkouts or strikes amounting to a substantial breach of the contract.

(2) Respondent believes it sound law and sensible labor-relations policy to insist on evidence of unequivocable repudiation by an employer following an alleged violation of a no-strike clause when the claim is raised that the strike amounted to such a material breach of the collective bargaining agreement as to permit the employer to terminate it. There are occasions when the fact of repudiation is not fairly arguable. *Cf. United Garment Manufacturing Co. v. Minnesota Joint Board*, 211 F. Supp. 414, (D. Minn., 1962), where the employer closed down the plant. Surely, however, a cessation of operations is not the only manifestation sufficient to establish an abandonment or repudiation by an employer of a collective bargaining agreement following an extended strike. The record in the instant case clearly shows that the respondent repudiated its collective bargaining obligations unequivocally and in full, as a direct result of the walkout and strike by members of the petitioner's union.

(3) Unlike *Drake Bakeries, supra,* the Iowa courts were

not dealing with a "one day strike", or any trivial infraction of the no-strike clause, but a strike of extended duration with, "mass picketing, threats and violence and intimidation of employees" of the respondent, significant elements of the bitter and continuing dispute.

B. In a doubtful case, the presumption is proper which favors arbitration's coverage, *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583. On the other hand, the burden shifts where a party seeking arbitration presses so far as to claim that, not only the merits of the grievance, but also the question of arbitrability is excluded from judicial determination. The petitioner here seeks to avoid the force of the usual presumption in favor of initial judicial determination of the issue of arbitrability. It maintains that in deciding that the strike involved in this case was a violation of the no-strike clause the Iowa Supreme Court has usurped the function of the arbitrator, because it was impossible for that court to decide that the strike constituted a waiver of arbitration without intruding upon the fundamental grievance question, that is, whether the participation in the strike by members of the petitioner's union was just cause for their discharge.

(1) We agree, of course, that not every strike is a violation of the no-strike clause. Some are, however; the strike underlying this case is one. It arose over alleged seniority rights (R. 39), one of the categories of economic issues which the union had contracted to put to arbitration, not self help. In electing to pursue the latter it waived the former.

(2) The question of a breach of the no-strike clause represents an issue expressly removed from the applicability and the scope of the arbitration procedure established under the contract between the petitioner and

respondent (R. 19). Neither the trial court nor the Iowa Supreme Court passed upon any question of the justness of the discharges in the wake of the walkout and strike. They held only: that under the circumstances of this case, if the petitioner had a remedy it was not arbitration, which it had waived by striking; that the walkout and strike in the setting of this case justified the respondent in repudiating the contract, including the arbitration clause; and that the respondent did repudiate the agreement.

C. Petitioner attempts to attack the decision below on the grounds that the pleadings reveal that there is a dispute as to whether a strike occurred. However, the pleadings in this case have been pierced through admissions made therein by the petitioner. These establish that 190 employees, all members of the petitioner's union, walked off their jobs and struck the plant, and that the walkout and strike was sanctioned and supported by the petitioner after knowledge of the facts. No serious contention to the contrary was made in the courts below and should not be permitted now. Moreover, even if the petitioner had a complaint about the propriety of the Iowa procedure observed in this case, or the adequacy of the Iowa courts' conclusions regarding the facts of the walkout, the strike, and the termination of the agreement by the respondent, surely that complaint cannot be reviewed in this Court, in the absence of any showing that important federally protected rights were impaired thereby. *Grayson* v. *Harris*, 267 U.S. 352, 357.

IV

Respondent did not expressly urge below and abandons here the argument that petitioner had waived its rights under the arbitration provision by filing an unfair labor practice charge with the National Labor Relations Board.

ARGUMENT

I

The Judgment of Which Review Has Been Sought Is Neither Final Nor Complete

By grant of the writ of certiorari, this Court has assumed jurisdiction of this cause. We respectfully suggest that the writ of certiorari was improvidently granted, and that this Court should not have asserted jurisdiction at this stage in the proceeding to review the decision below.

Under 28 U.S.C. 1257(3), this Court reviews only final judgments of state courts. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67. It is also the well established rule that a state court judgment, to be reviewable here, must be complete in that it finally disposes of all elements of the controversy. *Cotton* v. *Hawaii*, 211 U.S. 162, 170. If the judgment is not one which disposes of the whole case on its merits, it is not final. *Bostwick* v. *Brinkerhoff*, 106 U.S. 3, 4. This Court has consistently declined to undertake piecemeal review of the actions of state courts. *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U.S. 99, 101. A judgment, as the Court said in *Market Street R. Co.* v. *R. R. Commission*, 324 U.S. 548, 551:

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

The ruling of the Supreme Court of Iowa which this Court has been asked to review in the instant case is not a final or complete order, ripe for review at this time.

It is true that the decision of the Iowa Supreme Court has determined an important federal legal issue in the case. It has decided that a walkout in violation of a no-strike provision in a collective bargaining contract can sustain a judicial determination that the agreement was thereby terminated and the respondent company, against which the walkout was directed, thereafter could refuse to arbitrate disputes arising subsequent to the walkout and after the termination of the contract. The disposition of that issue, however, does not automatically give rise to appealability of the decision of the Iowa Supreme Court. See, *e.g.*, *Cincinnati Street R. Co.* v. *Snell*, 179 U.S. 395; *Laclede Gas Light Co.* v. *Public Service Commission*, 304 U.S. 398, 400.

In determining the finality of a state court judgment, the local law consistently has been regarded as a material, though not decisive, factor. *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 548. The effect which a state court judgment is accorded under the local rules of practice is germane to a determination of whether or not the judgment is final and ready for review in this Court. *Richfield Oil Corp.* vs. *State Board of Equalization*, 329 U.S. 69, 72.

The appeal which the petitioner took to the Supreme Court of Iowa was from a hearing and determination of points of law by the trial court, pursuant to Rule 105 of the Iowa Rules of Civil Procedure. Rule 332(a) of the Iowa Rules permits an interlocutory appeal in such circumstances "in advance of final judgment." For the appeal to be allowed, however, the Supreme Court of Iowa must find that the ruling of the lower court involves substantial rights, "will materially affect the final decision," and that a determination "before trial on the merits" will better serve the ends of justice. Leading commentators on Iowa civil practice have noted that an interlocutory order under Section 332(a) is one which "does not dispose of the cause,

being one that is directed preparatory to a final decision." Messer and Volz, Iowa Practice (West, 1957), Vol. II, p. 363; *Ruth & Clark* v. *Emery*, 235 Ia. 131, 15 N.W. 2d 896.

In affirming the ruling of the lower court, the Supreme Court of Iowa remanded the cause for "further proceedings pending therein." It did not direct the entry of an order or of judgment prior to a final determination of the issues that remain for resolution. Accordingly, there is not presented here the situation where a decision of the highest court of a state leaves open only the performance of a ministerial act on the part of the trial court, *Bacon & Sons* v. *Martin*, 302 U.S. 642, appeal dismissed for lack of finality, but a final judgment subsequently obtained and dismissed for want of a substantial federal question, 305 U.S. 380; *Crescent Creamery* v. *Milk Control Board*, 305 U.S. 559.

Respondent's counterclaim is still before the lower court; it has not been tried. The trial court has not yet entered any order disposing of the entire controversy between the parties. On the trial of the counterclaim, the petitioner will have full opportunity to present evidence and to argue the question whether there was a breach of the no-strike provision of the collective bargaining contract. If petitioner loses on that issue, it will have another opportunity to appeal to the Iowa Supreme Court and ultimately, if necessary, again seek certiorari of this Court. On the other hand, if the union prevails in the trial court and defeats the counterclaim by a showing that the strike or walkout did not violate the no-strike provision of the contract, petitioner will not be without appropriate and available means to reopen in the Iowa courts the federal issue temporarily foreclosed by the January 15, 1963 decision of the Supreme Court of Iowa, i.e., that the union was barred from arbitrating the discharge of employees because of its sanction

of and their participation in a walkout in violation of a no-strike clause.

Rule 244(h) of the Iowa Rules of Civil Procedure authorizes the granting of a new trial on the basis of errors "of law occurring in the proceeding, or mistakes of fact by the Court." Under Rule 247 of the Iowa Rules, such a motion may be made within 10 days after judgment, and under Rule 335, an appeal of a denial of such a motion may be taken within 30 days after the ruling on the motion. Therefore, should the petitioner defeat the counterclaim on the basis of evidence which establishes that the walkout was not in violation of the no-strike provisions of the collective bargaining agreement, under Iowa procedure it would have available to it persuasive grounds on which to move either for a new trial of its original complaint or reconsideration of the earlier rulings of law by the District Court for Woodbury County, and if necessary, to appeal again to the Supreme Court of Iowa.

Indeed, it is doubtful even that resort to a motion for a new trial would be necessary to reopen the petitioner's claim. While the decision of the trial court is, under Rule 105 of the Iowa Rules of Civil Procedure, "final" in the sense that under ordinary circumstances no attack may be made upon it, pursuant to Iowa procedure it was treated as "interlocutory" for purposes of appeal to the Supreme Court of Iowa. Thus, plainly under Rule 332(a) a "final decision" is still to be entered. Together, these rules appear to indicate that the decision is, under State procedure, not *res judicata*, but rather establishes only the law of the case. If this be so, then surely the ruling is subject to reconsideration by the State courts at any time up to entry of a "final decision" disposing of both the complaint and counterclaim in a final judgment. And while arguably

this might be regarded as of no practical consequence if the decision in question here were wholly unrelated to the issues remaining for trial by the Iowa trial court, that plainly is not this case, where an evidentiary hearing on the counterclaim will turn upon issues intimately related to the decision of which petitioner has obtained review by this Court. Moreover, it should be noted that the consideration that trial of the counterclaim might generate additional federal issues also weighs against assigning finality to the decision here in question. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71.

For the foregoing reasons, the decision of the Iowa Supreme Court does not constitute a final and complete judgment ready for review in this Court.

II

This Court Has Not Held that an Employer Will Always Be Compelled to Arbitrate the Breach of a No-Strike Clause

A. *Arbitration and No-Strike Provisions: Meaningfully Correlative Clauses.* Petitioner, in arguing against the decision below, asserts, in effect, that the very existence in a collective bargaining contract of a provision for arbitration of grievances in every instance obligates an employer to arbitrate all issues of all alleged grievances of the union, regardless of the terms of the contract, and whether or not the union has fulfilled its contract obligation to refrain from a strike. Thus, in its brief, petitioner suggests:

> The federal Courts of Appeals and District Court, unlike the Iowa courts, have uniformly held that a claimed breach of a no-strike clause does not prevent the union from obtaining arbitration. Some of the courts have expressly recognized that discharges for

participation in a strike claimed to be in violation of the agreement are arbitrable. In so deciding, these courts have rejected the argument, advanced by Respondent and accepted by the Iowa courts, that the union by its actions has waived or repudiated its right to arbitrate. * * *

Even if the Petitioner here admitted that it had violated the no-strike clause—and Petitioner has denied any violation—*the disputes presented by the grievances should have been submitted to arbitration.* [p. 9; Italics supplied].

The Iowa courts were plainly correct in rejecting this position. In doing so, they can claim recent pronouncements of this Court as support.

To sustain its position, petitioner purports to stand on a series of decisions of this Court and interpretative rulings of lower federal courts which have stressed the preeminent importance of arbitration in preserving industrial tranquility, and which also have rejected an artificially rigid interpretation of the statement in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455, that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." These decisions, nevertheless, have concurrently emphasized the corresponding importance of the "no-strike" clause, and have duly recognized that the parties to a collective bargaining agreement are at liberty to draft an arbitration provision as broad or as narrow as they deem suitable.

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 is one decision cited by petitioner. This Court there noted that "a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances." [p. 578]. It continued, however, "[C]omplete

effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes" [p. 578], so that "[t]he grievance procedure • • • rather than a strike, is the terminal point of a disagreement." [p. 581]. The concurring opinion emphasized further that "since arbitration is a creature of contract, a court must always inquire when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate a particular dispute." [p. 570].

Petitioner also believes it finds support in the recent decision of this Court in *Drake Bakeries, Inc.* v. *Bakery Workers*, 370 U.S. 254. That decision, emphasizing with respect to the asserted "*quid pro quo*" test that "this Court has prescribed no such inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation," concluded that the comprehensive arbitration provision in the contract there in issue required arbitration even of an asserted breach of the no-strike clause. The Court, however, carefully qualified its ruling to assure the employer that:

> "We do not decide in this case that in no circumstance would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union." [p. 265].

In a companion decision, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, the Court in fact concluded that a party to a collective bargaining contract which, as here, con-

tained a far narrower arbitration provision than that in issue in *Drake Bakeries*, retained that right.

Petitioner relies as well on a group of lower federal court decisions. *International Moulders and Foundry Workers* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (3d Cir., 1960); *United Textile Workers, Local* 120 v. *Newberry Mills, Inc.*, 315 F. 2d 217 (4th Cir., 1963), *Cert. den.* 32 U.S. L.N. 3131; *Local 748 International Union of Electrical Workers* v. *Jefferson City Cabinet Co.*, 314 F.2d 192 (6th Cir., 1963); *Retail, Wholesale and Department Store Union, Local 1085* v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M.D. Pa., 1961); *Armstrong-Norwalk Rubber Corp.* v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. Conn., 1958); *app. dis.*, 269 F.2d 618 (2d Cir., 1959). It is true that in each of these decisions the court required arbitration. However, that conclusion only followed close evaluation by the court of the scope of the arbitration agreement, the circumstances purporting to establish repudiation or recission of the agreement by the employer, and other factors which this Court has announced as relevant to any decision whether arbitration is required of the employer. None of these decisions control here or lend support for the mechanical standards petitioner has urged on this Court as the basis for reversal of the decision below.

B. *Broad Arbitration Should Be the Policy But Not the Automatic and Inflexible Command.* We respectfully suggest that if it be announced as the law that an employer is bound always to his agreement to arbitrate, whatever the terms of the agreement and the actions of the union, the very interests which the arbitration provision is intended to protect would be put in jeopardy. Whatever the imprecision in the view that arbitration and "no-strike" clauses are "*quid pro quo*" in a technical legal sense, it is never-

theless the common and justifiable understanding that these provisions are ordinarily viewed by the negotiating parties as correlatives. *Lincoln Mills, supra*, at 455; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567; *Warrior & Gulf Co., supra*, at 583. Should this Court approve an absolute restriction preventing the employer from enforcing his contractual guarantee of freedom from strikes except through the mechanics of arbitration, employers, as Mr. Justice Brennan has suggested, "will pause long before committing themselves to obligations enforceable against them but not against their unions." *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 227 (dissenting opinion).

We might note that at least one commentator and labor counselor has urged employers to insure themselves against any such one-sided rule by excluding both the arbitration and no-strike clauses from bargaining agreements. Robert Lewis, *The Long Pause*, C.C.H. Labor Law Journal, March, 1963, p. 277. And at least one major corporation apparently has given this advice at least partial heed in its most recent negotiations. See report of bargaining between General Electric Company and the Electrical Workers (IUE) in the Bureau of National Affairs Labor Relations Reports, Vol. 54, pp. 41-43, 97-98, 117-18, 144-47. Respondent also fails to perceive how tranquil and harmonious labor relations, the objective behind mutual pledges to arbitrate and not to strike, will be served by a rule of law which, in exalting arbitration, strips it of its only appeal to one of the two parties which must agree to its incorporation into the collective bargaining contract.

III

The Court Below Correctly Held that Arbitration Was Not Required

The validity of the respondent's repudiation of the collective bargaining agreement cannot be determined by any mechanical application of a presumption in favor of arbitration or rigid rule of law distinguishing the arbitrable from the non-arbitrable. We believe the court below properly held, on the facts of record, that the respondent was no longer obliged to arbitrate alleged grievances arising out of the termination of the employment of 191 employees.

A. *Respondent Was Relieved of Its Obligation to Arbitrate.* *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, we believe, best lays out the circumstances which will be considered in deciding whether a union's breach of a no-strike provision has the effect of freeing the employer of a commitment to arbitrate grievances, or other disputes. Primary, of course, are the terms of the arbitration provision itself, 370 U.S. 254, 257. Next in importance, perhaps, is the attitude or the position espoused by the employer, following the alleged breach by the union, with respect to the continuity of the collective bargaining contract, 370 U.S. 254, 261. Finally, the seriousness of the breach, its nature and duration, have an important and realistic relevance to the issue, 370 U.S. 254, 265. Collectively, these standards represent sound law and sensible labor policy. Judged in the light of these guides, the Iowa courts properly concluded that the respondent had been relieved of its contractual obligation to arbitrate the grievances submitted by the union following the walkout and strike underlying in this case.

1. The scope of the commitment to arbitrate would appear to be paramount. Where an employer, as in *Drake Bakeries, supra,* commits itself, or reasonably appears to have committed itself, to arbitrate disputes and grievances whether or not the union complies with its contractual obligation not to strike, it should not be heard to complain when a court requires it to do no more than that to which it has agreed or reasonably appears to have agreed. "[B]y agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes." 370 U.S. 254, 262. Toward the other extreme lies the contract, such as the one involved here and the one in issue in *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, which this Court interpreted as "not susceptible to a construction that the company was bound to arbitrate its claim for damages against the union for breach of the undertaking not to strike." The differing result in *Atkinson, supra,* as opposed to *Drake Bakeries, supra,* where arbitration was compelled, arises directly out of the Court's recognition that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241.

This attitude did not originate in these two landmark decisions. Both prior to and since those holdings, inferior federal courts considering the close correlation of no-strike and arbitration provision have held the breadth of the arbitration clause to be determinative. Compare three recent decisions of the Sixth Circuit. In *Vulcan-Cincinnati Inc.* v. *United Steelworkers,* 289 F.2d 103 (6th Cir., 1961) and in *International Union* v. *Benton Harbor Malleable Industries,* 242 F.2d 536 (6th Cir., 1957) the Sixth Circuit did not

require arbitration of damages for alleged breach of the no-strike clause, as the arbitration clauses were narrowly limited to employee grievances. Conversely, in *Jefferson City Cabinet Co.* v. *International Union*, 313 F.2d 231 (6th Cir., 1963), *cert. den.*, 373 U.S. 936, the court compelled arbitration of damages, pointing out that the arbitration clause, unlike that in issue in the two earlier cases cited, contemplated arbitration of employer grievances as well.

The arbitration provision in issue here, as the provision before the Court in *Atkinson, supra*, is limited in coverage. It is the fifth step in a carefully drawn procedure established for processing of *employee* grievances only; arbitration is available only "upon the request of the Union." Neither respondent nor petitioner has obligated itself to arbitrate employer grievances, with respect to which the employer is free to pursue such other remedies as may be available. Moreover, the union has conceded, implicitly at least, that, no "claim for damages for [the petitioner's] alleged violation of a no-strike clause is the subject of grievances or otherwise before [the Iowa Supreme Court] . . ."[8] If respondent did not bargain away its right to maintain action for breach of the no-strike clause, surely that is additional and significant evidence that the scope of the arbitration clause does not reach to embrace walkouts or strikes amounting to a substantial breach.

2. The employer's actions following breach of the no-strike provision also are of importance. Thus, in striking down an employer's bid to avoid arbitration, the Court in *Drake Bakeries, supra*, 370 U.S. 254, 261, stressed that:

> "The company has not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the ar-

[8] Appellants' Reply Brief before the Iowa Supreme Court, p. 13.

bitration provisions. Instead, it has sued for damages for an alleged strike and, as far as this record reveals, the contract continued in effect, as did the promises of the parties to arbitrate and the promise of the union not to strike.''

To like effect, see *Local 748 International Union of Electrical Workers* v. *Jefferson City Cabinet Co.*, 314 F.2d 192 (6th Cir., 1963), and *United Textile Workers of America* v. *Newberry Mills, Inc.*, 315 F.2d 217 (4th Cir., 1963), *cert. den.*, 32 U.S.L.W. 3131, both stressing, as in *Drake Bakeries, supra*, the employers' ambivalent reaction to the unions' breach, and in each case concluding that the employer concerned had not unequivocally repudiated further continuation of the contract.

This attitude that the employer should not be permitted to have it both ways has a threefold basis. As a practical matter, a party's actions following an alleged breach of a contract, to a degree at least, reflect his understanding of his rights and obligations under the contract. Moreover, as a matter of hornbook contract law, a party to a contract which has been materially breached by the other party must elect either to repudiate the contract in its entirety or to continue the contract in effect and seek relief by suit for damages for breach. Ordinarily, he does not have an option to take a middle course; a litigant cannot affirm and disaffirm a contract at the same time. *Paskvan* v. *Mesich*, 227 F.2d 646, 650 (9th Cir., 1955).

Finally, and most importantly, requiring the employer to elect either to abide by the contract or to repudiate it makes good labor relations sense. The collective bargaining agreement contemplates a continuing relationship between management and union. The grievance procedure and no-strike clause together provide the intended basis for insuring that this relationship remain stable. Such

stability is important both to management and to labor. Where, however, because of breach of a no-stike provision, the relationship between union and management has deteriorated to the unfortunate point where the employer is willing to cast off the contract and sever all relations with the union, arbitration is most unlikely to produce its intended tranquilizing results. In these circumstances, the absence of arbitration cannot further disrupt labor-management relations. This was the interpretation given the above quoted language of *Drake Bakeries, supra*, by one Federal District Court, which refused the union's demand for arbitration where it would not have been beneficial in the existing industrial setting. *United Garment Manufacturing Co.* v. *Minnesota Joint Board*, 211 F. Supp. 414 (D. Minn., 1962). In that decision, the employer had closed down its plant and ceased operations following a strike by defendant union. While the case is perhaps the epitome of a complete collapse of labor-management relations, it does illustrate that an extended strike can justify an abandonment, however drastic, by the employer. 221 F. Supp. 414, 419.

The record establishes, we believe, that this respondent repudiated its collective bargaining obligations, unequivocally and in full, as a direct result of the strike (R. 41). Surely, a cessation of operations is not the only manifestation by which to prove an abandonment of the agreement.

3. If labor law is to be related to the realities of labor relations, certainly the nature of the strike looms as a very significant factor to be considered in determining in a particular case whether an employer is discharged of an obligation to arbitrate. Thus, the Court in *Drake Bakeries, supra*, emphasized that it was dealing with a "one-day strike." This would seem no more than a logical application of the

traditional legal position against dealing with trifles. In the important area of collective bargaining relations, a total disruption quite properly should not be allowed over a trivial infraction of even as important a provision of the agreement as the no-strike clause.

As we have shown below, however, the record reveals that the strike which provoked this respondent to repudiate the collective bargaining agreement was no trivial infraction of the union's guarantee, but was of extended duration.

In sum, therefore, the Iowa courts, under a contract containing no express or fairly implied guarantee by the employer to arbitrate following breach of the no-strike clause, found respondent no longer obligated to arbitrate, because it had unequivocally repudiated the collective bargaining contract following a gross and continuing breach of the no-strike clause. The conclusion of the courts below that the respondent was relieved of the obligation to arbitrate may have rested on grounds not too persuasively articulated in their opinions. Nevertheless, the result reached was correct in the light of the controlling criteria emerging from this Court's decisions in *Drake Bakeries, supra,* and in *Atkinson, supra.*

B. *The Presumption in Favor of Arbitration is Rebutted in This Case.* The issue of arbitrability, we believe, is always a question in the first instance for the courts, *United Steelworkers* v. *Gulf Nav. Co.*, 363 U.S. 574, 582; *Drake Bakeries, supra,* at 256. In the doubtful case the presumption is, and from the point of view of harmonious labor-management relations, perhaps should be, in favor of arbitration's coverage, *United Steelworkers* v. *Gulf Nav. Co., supra,* at 583. On the other hand, where a party seeking arbitration presses so far as to claim that not only is the decision of the merits of a grievance "excluded from court determination", but also "the question of arbitra-

bility," the burden borne and the presumption working, shift against that party, *United Steelworkers* v. *Gulf Nav. Co.*, *supra*, at 583, f.n. 7; cf. Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L.R. 1482, 1508-09 (1959).

The petitioner attempts to relieve courts of any obligation to resolve the issue of arbitrability by a disarmingly simple line of argument. "Not all strikes violate no-strike clauses" [p. 21]. In deciding that the strike involved in this case violated the no-strike clause, the Iowa Supreme Court "usurps the function of the arbitrator. . . ." [p. 22]. This is so, the petitioner maintains, because it "was virtually impossible for the courts below to decide that the asserted strike waived the right to arbitrate without intruding upon" the fundamental grievance question, i.e., "whether participation in the alleged strike constituted just cause for discharge." [p. 14]. Respondent shows below that either singly or in argumentative combination the above-stated propositions fail to carry the petitioner's case.

1. Citing this Court's decision in *Mastro Plastics* v. *N.L.R.B.*, 350 U.S. 270, petitioner asserts that not every strike is a violation of a no-strike clause, and argues that no violation has in fact occurred here. We note initially that petitioner's reliance on *Mastro* is demonstrably misplaced. That decision, as petitioner contends, did hold that not all strikes violate a no-strike clause, even one written in absolute terms. The underlying circumstances there involved, however, presented "a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative." [p. 278]. This Court, construing the no-strike provision in its contractual setting as a guarantee only against strikes over the "*economic* relationship between employers and their employees," found such a pro-

vision appropriate, provided that "the selection of the bargaining representative remains free." (Italics supplied) [p. 280]. Because the strike evolved from the employer's interference with the employees' free selection of their bargaining representative, the no-strike guarantee was held inapplicable in that case. The strike which furnishes the background for the case at bar, however, arose over alleged seniority rights (R. 39), one of the categories of economic issues which the union had contracted to put to arbitration, not self help. In electing to pursue the latter it waived the former, as the courts below correctly concluded.

2. The strike in this case, by petitioner's own admission, related to an issue clearly committed to arbitration under the contract for which the grievance procedure was expressly available to the petitioner or to the members of its union. On the other hand, as shown above, the question of a breach of the no-strike clause represents an issue just as clearly *removed* from the applicability and the scope of the arbitration procedure set up in the contract, since by its express terms only *employee*, not employer, grievances were covered (R. 19).

We do not believe, therefore, that the Iowa courts usurped "the function of the arbitrator" in deciding that the petitioner's election to take up the weapons of self-help rather than abiding by the grievance procedure, which, under the contract, was available only to it, constituted such a material breach of the collective bargaining agreement as to justify the respondent's repudiation of it. The record is perfectly clear that the courts below did not pass upon the justness of the discharges in the wake of the walkout and strike, but held only that if the petitioner had a remedy it was not arbitration, which it had waived by striking. The trial court said:

"Plaintiff argues that the arbitrator and not the Court should determine whether the walkout was a violation of the terms of the contract or whether it may have been justified by the conduct on the part of defendant. The fact is, however, that this Court is not concerned for the present purpose with whether or not the walkout was justified or whether or not filing a claim with the National Labor Relations Board was not a matter that the arbitrator could have determined. This court is only concerned with the fact that the plaintiff *did* do these things, and the law is clear that where the parties have agreed to arbitrate and that agreement is a quid pro quo for an agreement not to strike or to lockout, the election to strike or lockout constitute a waiver and election of remedies." (R. 48-49)

Nor is their anything in the Iowa Supreme Court's opinion which suggests that it took a broader view of the question. The governing issue before the Iowa courts was the propriety of the employer's repudiation of a collective bargaining contract, including its arbitration provisions. As this Court, we believe, made clear in *Atkinson* v. *Sinclair Refining Co., supra,* the union cannot, merely by the assertion of an employee grievance, compel arbitration of an issue which only the employer would raise and which therefore was excepted from the mechanics of the arbitration procedure established for the union's sole benefit. Any other result would abort this Court's careful delineation in *Drake Bakeries, supra,* of the circumstances under which an employer could be relieved of its obligation to arbitrate. For by the mere assertion of a grievance over the employer's conduct following the repudiation, the union could vitiate the very effect of the repudiation.

C. No Relevant Facts Are in True Dispute. Petitioner, finally, attacks the decision below on the ground that there exists a dispute as to whether a strike occurred. Here, the petitioner's "denial" consists of a claim that it had not authorized the strike. However, this denial is accompanied by petitioner's admission that "certain of defendants' employees within the bargaining union, represented by plaintiff, left their jobs at defendants' plant," and was made in the context of a claim by petitioner for reinstatement of the employees who had concededly walked out and was coupled with a defense of the justness of the strike. Respondent's amended answer, which was not contested,[4] asserts further:

> * * *that on May 11, 1961 the said 190 persons and the said Anton Stamoulis left their jobs and the premises of defendant after being each notified that said action was a breach of contract. Defendant alleges further that on the 12th day of May, 1961 defendant addressed a letter to each of the 191 employees inviting them to return to work immediately and advising them that their leaving was in breach of contract and that if they did not immediately [fol. 59] return, their jobs would be filled by permanent replacements. The said letter further advised said employees that their alleged cause of leaving the work, to wit: the discharge of Anton Stamoulis, would be processed as

---

[4] Rule 73 of the Iowa Rules of Civil Procedure, "Reply," provides that:

"There shall be a reply to a counterclaim, and to new matter in an answer, responding thereto in the same manner that an answer responds to a petition, but not inconsistent with the petition. Points of law arising on the face of the answer may be raised by reply."

Under Rule 102 of the Iowa R.C.P., with exceptions not pertinent here, the failure to deny allegations of fact in an amended answer constitute an admission of them.

a grievance under the terms of Section 33 of the contract Exhibit "A". Thereupon and on or about May 15, 1961, *at a formal called meeting of plaintiff Union, plaintiff and its members unanimously rejected the offer of defendant that they return to work and that the Stamoulis matter be handled as a grievance, and the said plaintiff advised defendant on* or about May 15, 1961 of their rejection. * * * (R. 41). [Italics supplied].

It was against this background that the trial court, while recognizing that it could not settle any issue turning upon disputed facts, concluded:

"Even though it is alleged that Union officers advised against the walkout, it, nevertheless, occurred and the Union is apparently supporting the action of the employees. There is no substantial dispute here as to the facts." (R. 48).

The Supreme Court took an identical view of the uncontested facts:

"It is not seriously contended in this court that the 190 workers did not walk off the job and are still refusing to return thereto." (R. 56).

Moreover, it should be noted that the trial court was most familiar with the circumstances of the strike, since one month before the suit in question was filed that same court, after a full hearing, had issued a permanent injunction against "mass picketing, threats, violence and intimidation" by officers and members of the petitioner. See fn. 1 *supra*. It is not plain whether the court took judicial notice of this prior proceeding. Certainly, the public events, widely reported, which formed the background of that proceeding,

fell fairly within the permissible scope of proper judicial notice. *Cf. Donnelly Garment Co.* v. *Dubinsky*, 55 F. Supp. 587, 594 (W.D. Mo. 1944), affirmed, 154 F.2d 38 (8th Cir., 1946); *N.L.R.B.* v. *Fresh'nd Aire Co.*, 226 F.2d 737 (7th Cir., 1955). Whether it did or did not invoke judicial notice, however, the admissions of record appear adequate to justify the trial court's finding of an obvious, intentional, and severe violation of the terms of the broad no-strike clause.[5]

While the bare pleadings without more possibly might support the petitioner's argument that the decision below rested "on unproved facts," the complete record demonstrates that the pleadings have been pierced, in effect, as a result of the petitioner's own critical admissions, as well as by the controlling applicability of pertinent rules of Iowa civil procedure and a reasonable understanding of the permissive use of the doctrine of judicial notice. If the petitioner has a complaint about the propriety of the Iowa procedure which was observed in this case, or of the adequacy of the Iowa court's conclusions with respect to the critical facts, i.e., that the employees walked out, that the petitioner sanctioned and supported the strike over a long period of time, and that, as a consequence, the employer terminated the agreement, surely that complaint cannot be reviewed by this Court, in the absence of any showing that important federally protected rights were impaired by the procedure applied or as a result of the factual conclusions

---

[5] The no-strike clause expressly prohibits the employer from engaging in a work stoppage or a strike *and* the union from calling or sanctioning them (R. 8-9). Thus, even if the petitioner's denial that it approved a strike, its position would not be improved. As to the 191 employees who walked out, arbitration has been waived and its these alleged discharges, and no others, which the petitioner attempted to raise through the grievance procedure.

arrived at, *Egan* v. *Hart*, 165 U.S. 188, 189; *Grayson* v. *Harris*, 267 U.S. 352, 357; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed.), p. 196.

Moreover, even if the petitioner was correct in contesting the adequacy of the factual showing on which the decision below rested, should the case be remanded to establish by evidence what already has been fairly established on the basis of the pleadings and by petitioner's admissions of record? Respondent respectfully submits that if this Court agrees that the apparent, but perhaps not yet formally proven, facts of record can support the decision reached below, it should affirm that decision, rather than remand the case for further proceedings in the lower courts to establish what both parties know, and the courts below justifiably assumed, are the material facts on which this case must turn.

IV

Filing Unfair Labor Practice Charges Is Not a Waiver of the Right to Arbitrate

The Iowa trial court concluded that petitioner, by filing an unfair labor practice charge with the National Labor Relations Board, had waived its rights to proceed pursuant to the arbitration provisions of the contract. Respondent did not expressly urge this in the Iowa Supreme Court as a basis for affirming the trial court. And the Iowa Supreme Court did not expressly pass on the point.

We are persuaded that, with respect to this one issue, and this one issue alone, the petitioner is correct. We make express note of our views at this point in order not to consume the Court's time on an issue neither urged nor decided below and abandoned here.

Conclusion

For the reasons stated, respondent respectfully suggests that the writ of certiorari was improvidently granted in this case, but that if the merits are properly before the Court the decision of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

ALFRED L. SCANLAN,
ROBERT T. BASSECHES,
734 15th Street, N.W.,
Washington 5, D. C.

JAMES A. GILKER,
3015 Free Ferry Road,
Fort Smith Arkansas.

JESSE E. MARSHALL,
1109 Badgerow Building,
Sioux City, Iowa,
Attorneys for Respondent.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D. C.
Of Counsel.

October 23, 1963.

(8743-7)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 19 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

NEEDHAM PACKING COMPANY d/b/a SIOUX CITY DRESSED BEEF, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF FOR PETITIONER.

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 West Adams Street,
Chicago 3, Illinois,

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa.

INDEX.

	PAGE
Statement of the Case	1
Argument:	
I. The judgment below is a final judgment within the meaning of Section 1257 of the Judicial Code. The Supreme Court of Iowa ruled that Petitioner waived its right to arbitrate by engaging in a walkout. That decision is not subject to further review in any Iowa tribunal	2
II. There are no pertinent facts with respect to the alleged strike which are not disputed. The issue raised by Respondent's defense of a strike in violation of contract is fully presented by the pleadings	7
III. In the absence of contractual language excluding the grievances from the provisions of the arbitration clause, only the most unequivocal indication of total repudiation of the contract would warrant a court's refusing to order arbitration. The effects of the claimed strike are for the Arbitrator to decide	12
Conclusion	21

CITATIONS.

Cases.

Armstrong-Norwalk Rubber Corp. v. United Rubber Workers, Local 283, 167 F. Supp. 817 20

Atkinson v. Sinclair Refining Co., 370 U. S. 238 (1962) 20

Banks v. Carrell, 241 Iowa 786, 43 N. W. 2d 142 (1950) 11

Bash v. Hade, 244 Iowa 272, 55 N. W. 2d 278 (1953) 10

Clark v. Willard, 292 U. S. 112, 118 (1934) 3

Dawson v. Laufersweiler, 241 Iowa 850, 43 N. W. 2d 726 (1950) 10

Drake Bakeries, Inc. v. Local 50, American Bakery and Confectionery Workers, 370 U. S. 254 ..... 12, 16, 18

Federated Mutual Implement & Hardware Ins. Co., 252 Iowa 1208, 1218, 110 N. W. 2d 264, 270 (1961) 10, 11

Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 106 N. W. 2d 86 (1960) 10

International Moulders & Foundry Workers v. Susquehanna Casting Co., 283 F. 2d 80 ..... 6, 20

Largent v. Texas, 318 U. S. 418, 421-22 (1943) 3

Local No. 438 Construction & General Laborers' Union v. Curry, 371 U. S. 542 (1963) 6

Local 748 International Union of Electrical, Radio and Machine Workers v. Jefferson City Cabinet Co., 314 F. 2d 192 20

Market Street Ry. Co. v. Railroad Com'n of California, 324 U. S. 548, 552 (1945) 3

Pope v. Atlantic Coast Line R. Co., 345 U. S. 379, 382 (1953) 3

Retail, Wholesale and Department Store Union, Local 1085 v. Vaughn's Sanitary Bakery, Inc., 196 F. Supp. 633 20

Shalla v. Shalla, 237 Iowa 752, 764, 23 N. W. 2d 814, 820 (1946) 10

State ex rel. Kuble v. Capital Benefit Ass'n, 237 Iowa 363, 21 N. W. 2d 890 (1946) 10

United Steelworkers of America v. American Mfg. Co., 363 U. S. 564 ..... 3, 4, 14, 15, 21

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593 ..... 14, 20

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574 ..... 14, 15, 16, 18

United Textile Workers of America, Local 120 v. Newberry Mills, Inc., 315 F. 2d 217 15

Verlinden v. Godberson, 238 Iowa 161, 25 N. W. 2d 347 (1947) 10

Miscellaneous.

Rule 105, Iowa Rules of Civil Procedure 5

Rule 332(a), Iowa Rules of Civil Procedure 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 102

LOCAL UNION NO. 721, UNITED PACKINGHOUSE, FOOD AND ALLIED WORKERS, AFL-CIO,

Petitioner,

vs.

NEEDHAM PACKING COMPANY d/b/a SIOUX CITY DRESSED BEEF, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The "Statement of the Case" in Respondent's Brief (pp. 3-8) contains a section headed "2. The Walkout and Ensuing Strike" (Brief, pp. 5-7). To a considerable extent that section recites as undenied facts matters alleged in Respondent's Answer to Plaintiff's Amendment to Petition (R. 40-41). For the reasons set out fully in Point II of this Brief (*infra*, pp. 7-12), Petitioner does not believe that allegations of that pleading may be treated as admitted.

ARGUMENT.

I.

THE JUDGMENT BELOW IS A FINAL JUDGMENT WITHIN THE MEANING OF SECTION 1257 OF THE JUDICIAL CODE. THE SUPREME COURT OF IOWA RULED THAT PETITIONER WAIVED ITS RIGHT TO ARBITRATE BY ENGAGING IN A WALKOUT. THAT DECISION IS NOT SUBJECT TO FURTHER REVIEW IN ANY IOWA TRIBUNAL.

Respondent suggests that the Writ of Certiorari was improvidently granted (Brief, pp. 14-18). The arguments advanced are precisely the ones Respondent originally urged in its Brief in Opposition to the Petition (pp. 9-13). In essence, Respondent contends that when its counterclaim for breach of contract is determined, Petitioner *might* have "appropriate and available means to reopen in the Iowa courts the federal issue temporarily foreclosed by the January 15, 1963 decision of the Supreme Court of Iowa, i.e., that the union was barred from arbitrating the discharge of employees because of its sanction of and their participation in a walkout in violation of a no-strike clause" (Brief, pp. 16-17). Presumably, therefore, should Petitioner succeed at some indeterminate future time in utilizing an appropriate procedure for reopening the issue of its right to compel arbitration under Section 301 of the Labor-Management Relations Act, it *might* obtain relief in an Iowa court. On this view, arbitration *might* be ordered and *might* take place eventually. Given the probable lapse of time before any such event, however, it is far from clear that the policy of the Federal labor laws favoring arbitration would be served. Arbitra-

tion long delayed may be of no worth to anybody; it may not even have therapeutic value. Cf. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960).

The decisions relied upon by Respondent do not establish the non-finality of the judgment below. The test for determining whether a state court judgment is final is "a practical one." *Market Street Ry. Co.* v. *Railroad Com'n of California*, 324 U. S. 548, 552 (1945). Attempting to classify what the Supreme Court of Iowa did as in some way interlocutory does not preclude its being final for purposes of Section 1257. Viewed realistically, the judgment below foreclosed the possibility of Petitioner's compelling arbitration by its proceeding in the Iowa courts. As to that issue "there is nothing more to be decided." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 382 (1953); *Clark* v. *Willard*, 292 U. S. 112, 118 (1934). Petitioner, at this point, can do nothing in the Iowa courts which will affect or alter their determination that it waived its right to arbitrate. The possibility that, on a trial of Respondent's counterclaim, a result might be reached which could lead to a reopening of the petition to compel arbitration does not affect finality for present purposes. Cf. *Largent* v. *Texas*, 318 U. S. 418, 421-22 (1943).

Respondent's argument that "an evidentiary hearing on the counterclaim will turn upon issues intimately related to the decision" now before this Court (Brief, p. 18), far from being a reason for requiring Petitioner to wait until the counterclaim is tried, is actually a compelling reason why the Iowa judgment should be reviewed now. In effect, what Respondent urges is that the Iowa courts must hear and resolve an issue involving the merits of the grievances Petitioner sought to bring to an arbitrator. Were Respondent's procedural suggestions to prevail, the arbitrator could sit *only after the Iowa courts had reviewed the merits.* By categorizing the Iowa judgment as not final,

Respondent thus seeks to accomplish by indirection precisely what this Court has repeatedly announced should not be countenanced. If a court, when presented with a Section 301 suit to compel arbitration, must refrain from considering the merits on the theory that the parties have contracted for a decision by an arbitrator, surely the simple filing of a counterclaim for damages for breach of a no-strike clause cannot justify the court's hearing the merits prior to sending the grievances to arbitration. The policy embodied in *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (1960), ought not be subject to circumvention so readily.

Moreover, Respondent's discussion of principles of Iowa procedure fails to take into account just what the Supreme Court of Iowa actually decided. The decision in the trial court was reached on Respondent's application for a ruling that Petitioner "is not entitled to the relief asked for the reason that it appears by the pleadings herein that any right to enforce the grievance and arbitration provisions of the contract . . . has been waived by [Petitioner] by . . . engaging in a 'walkout' in violation of the contract . . ." (R. 41-42). The trial court stated the issue as follows (R. 48): The "second point of law is that [Petitioner] has waived its right to arbitrate by . . . 1. Indulging in a walkout and picketing in violation of the terms of its contract . . ." In deciding that issue, the trial court ruled that "as a matter of law . . . [Petitioner] has waived its right to arbitration in this case by electing the walkout or strike . . ." (R. 50). The court then added the following paragraph (R. 50):

> The ruling of the Court sustaining defendant's contention in its application for ruling on law points hereinabove stated, constitutes a *final order* on the

points so ruled upon. Since the ruling does not dispose of the whole case, however, it is interlocutory for the purposes of appeal (Emphasis added).*

The Supreme Court of Iowa affirmed the order of the trial court. Specifically, it held that "the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout" (R. 59). The cause was remanded "for further proceedings pending therein" (R. 59).

The only matter pending, of course, was Respondent's counterclaim. The final order of the trial court, as affirmed by the Supreme Court of Iowa, put an end to Petitioner's petition seeking an order to compel arbitration. To all intents and purposes the petition was denied, if not formally dismissed, and any future relief under the petition could come only by way of some "means to reopen" or a motion for "new trial" or for "reconsideration of the earlier rulings of law", as Respondent concedes (Brief, pp. 16-17).

These detours to relief would be available, on Respondent's theory, only after "an evidentiary hearing on the counterclaim. . . ." (Brief, p. 18). Thus, although courts are not to consider the merits of grievances when the parties contract for arbitration, the hearing of evidence on what Respondent characterizes as "intimately related" issues (Brief, p. 18) is a precondition for Petitioner's seeking to have the Iowa courts reconsider what they have

* The trial court thus entered "an appropriate final order before trial of the remaining issues, adjudicating the point so determined . . ." in accordance with the express provisions of Rule 105 of the Iowa Rules of Civil Procedure (reprinted in Respondent's Brief, p. 3). The wording of the Rule indicates clearly that it is intended as a means of *finally* disposing of issues before trial. The disposition of an issue is no less final simply because other issues remain. The interlocutory character of the disposition relates to its appealability. Cf. Rule 332(a) of the Iowa Rules of Civil Procedure (reprinted in Respondent's Brief, p. 3).

done. Respondent insists, therefore, that the Iowa courts must do *first* what this Court has suggested that courts in Section 301 cases to compel arbitration should not do at all.

While technically the issue may not be one of jurisdiction, it certainly touches upon a strong policy against judicial participation. Conceivably, after hearing the counterclaim, the Iowa courts might determine that arbitration should have been ordered in the first place. The interim proceedings determinative of the counterclaim, therefore, might in time lead the Iowa courts to the right result on Petitioner's original petition.

To argue that this remote prospect robs the Iowa judgment of finality is to say that so long as hope of discretionary judicial reconsideration remains no order is final. In this sense, of course, the temporary injunction in *Local No. 438 Construction & General Laborers' Union* v. *Curry*, 371 U. S. 542 (1963), was not final either.

Respondent apparently would make the arbitration of grievances growing out of a strike or walkout dependent upon judicial proof that the union did not violate the no-strike clause. Actually, however, the right to arbitrate does not ordinarily depend upon establishing the absence of such violation. There are more issues in the grievances involved here than simply the question of whether Petitioner or the employees violated the agreement. Even if there were found to be a breach of contract, only the arbitrator could decide whether discharge was an appropriate penalty. *International Moulders* v. *Susquehanna Casting Co.*, 283 F. 2d 80, 81 (C. A. 3d 1960). Petitioner could lose the counterclaim and yet be entitled to arbitrate the grievances. Respondent leaves no room for this possibility. It can hardly argue that the Iowa courts would be receptive to Petitioner's plea to reopen the petition to compel arbitration even after a trial had resulted in a judgment in Respondent's favor on the counterclaim.

Furthermore, insofar as the argument offers hope to Petitioner only after the conclusion of proceedings on the counterclaim, it necessarily leaves the fate of possible arbitration entirely in Respondent's hands. Respondent could decide at any time to abandon its counterclaim. In that event it is difficult to see what remedy, if any, Petitioner would have. On Respondent's theory Petitioner's only recourse would be to insist on a trial of the counterclaim for the sole purpose of proving facts upon which to base a plea to the Iowa courts to reconsider their decision that Petitioner's right to arbitrate had been waived. Pushed to this extreme, Respondent's suggested procedure borders on the ridiculous.

II.

THERE ARE NO PERTINENT FACTS WITH RESPECT TO THE ALLEGED STRIKE WHICH ARE NOT DISPUTED. THE ISSUE RAISED BY RESPONDENT'S DEFENSE OF A STRIKE IN VIOLATION OF CONTRACT IS FULLY PRESENTED BY THE PLEADINGS.

Respondent argues (Brief, pp. 32-35) that Petitioner made certain "critical admissions" in the pleadings which justified the trial court in finding "an obvious, intentional, and severe violation" of the no-strike provisions of the collective agreement. The argument rests, almost in its entirety, on the assertion that, despite the requirement of the Iowa Rules of Civil Procedure, Petitioner failed to reply to an amendment to Respondent's Answer and that such failure constituted an admission of the facts alleged. This contention distorts the pleadings; it also ignores decisions of the Supreme Court of Iowa with regard to the function of a reply.

The pleadings below consisted of the following: 1) the Petition in Equity (R. 1-6), to which were attached the collective bargaining agreement (R. 7-21), the grievances (R.

22-24), and certain correspondence between the parties (R. 25-29); 2) the Answer, Affirmative Defenses, Legal Defenses, and Counterclaim (R. 39); 3) the Amendment to Petition (R. 39-40); 4) Respondent's Answer to Plaintiff's Amendment to Petition (R. 40-41), which is somewhat misleadingly referred to as an "amended answer" in Respondent's Brief (p. 32); 5) the Reply and Answer to Counterclaim (R. 34-39); and 6) the Application to the Court to hear and determine points of law raised in the pleadings (R. 41-42).

The Amendment to the Petition (R. 39-40) was concerned with altering allegations in the Petition concerning the dates of the employee discharges; the Petition alleged that the employees were discharged on or about May 17, 1961 (R. 3), while the amendment alleges that one employee was discharged on or about May 11, 1961 and that 190 other employees were discharged on or about June 26, 1961 (R. 39-40). These dates were possibly significant in light of Respondent's First Legal Defense (R. 32-33), which asserted that the grievances were not timely since presented more than fourteen days after the occurrences.

The issue framed by the Amendment to Petition related principally to the *timeliness of the grievances*, and, in filing its Answer to Plaintiff's Amendment to Petition (R. 40-41), Respondent so treated it. Concerning the allegation that one employee, Anton Stamoulis, was discharged on or about May 11, 1961, Respondent answered that that employee "left the defendant's premises and refused to proceed further with the grievance . . . and waived any further right to process the said grievance" (R. 40). With regard to the allegation that on or about June 26, 1961 it discharged 190 other employees, Respondent denied the discharges and alleged that on May 11, 1961 "said 190 persons and . . . Anton Stamoulis left their jobs and the premises of defendant after being each notified that said action was a

breach of contract" (R. 41). After some elaboration on the events which took place subsequent to May 11, 1961, Respondent denied that it "took any action on or about June 26, 1961 to discharge the said employees . . ." and asserted that the 191 employees "ceased to be employees" by their own voluntary actions (R. 41).

Thus the allegations in the Answer to Plaintiff's Amendment to Petition, which are relied upon so extensively in Respondent's Brief (pp. 5-6, 13, 32-35), were directed to the crucial question of whether there were discharges and, if so, when they occurred. The issue of the discharges of Anton Stamoulis and the other 190 employees—and of the time of such discharges—was fully presented in Petitioner's Amendment to the Petition and Respondent's Answer. As to that issue nothing needed saying by way of Reply.

Respondent's Brief (pp. 32-33), however, employs the allegations of its Answer to the Amendment to Petition as though they pleaded the key facts concerning the strike. The circumstance that Petitioner did not reply to them is thus taken as a critical admission (Brief, p. 34). Actually, though, the strike, its duration, the picketing, the claim that the strike constituted a breach of contract, and the assertion that Petitioner's conduct justified Respondent's "terminating its obligations" and constituted a waiver of any right to proceed with the grievances were pleaded by Respondent as its First, Second, and Third Affirmative Defenses (R. 31-32). These allegations were met by Petitioner's Reply (R. 34-36). With respect to the claim that there was a strike, Petitioner denied that it struck or set up a picket line, admitted that "certain of defendant's employees.... left their jobs at defendant's plant on or about May 11, 1961", pleaded justification for what the employees did, and denied that Petitioner "authorized any such action . . ." (R. 34).

Clearly, therefore, the issues urged by Respondent based on the claim of a strike, breach of contract, justification for Respondent's treating its obligations as terminated, and Petitioner's waiver of the right to arbitrate were fully pleaded by the affirmative defenses in Respondent's Answer and by Petitioner's Reply to those defenses. Insofar as further allegations in Respondent's Answer to Amendment to Petition may be said to have related to those issues, they added mere embellishment. The issues were posed more than adequately by the Answer and the Reply.

The Iowa Supreme Court has repeatedly held that in such circumstances, where an issue is framed by the pleadings, no further pleading is necessary. ". . . [T]he purpose of a reply is to complete the issues." *Shalla* v. *Shalla*, 237 Iowa 752, 764; 23 N. W. 2d 814, 820 (1946). "If the facts stated in the petition contradict facts stated in the answer, the issues are joined without the necessity of a reply." *Federated Mutual Implement & Hardware Ins. Co.*, 252 Iowa 1208, 1218; 110 N. W. 2d 264, 270 (1961). See also *Verlinden* v. *Godberson*, 238 Iowa 161; 25 N. W. 2d 347 (1947); *Dawson* v. *Laufersweiler*, 241 Iowa 850, 43 N. W. 2d 726 (1950); *Bash* v. *Hade*, 244 Iowa 272, 55 N. W. 2d 278 (1953); *Henderson* v. *Hawkeye-Security Ins. Co.*, 252 Iowa 97, 106 N. W. 2d 86 (1960).

These decisions make it clear that the Iowa courts do not insist upon a formal denial of allegations where the issue to which the allegations relate is already adequately framed by the pleadings. The test is whether any *new issues* are raised in the answer; if not, the mere fact that allegations in the answer are not formally denied in a pleading denominated a reply is of no significance. *State ex rel., Kuble* v. *Capital Benefit Ass'n*, 237 Iowa 363, 21 N. W. 2d 890 (1946).

There is a further reason why Respondent's present em-

phasis upon Petitioner's "critical admissions" is misplaced. Respondent's application to the trial court to determine points of law does not rely upon, or even mention, Petitioner's supposed failure to reply to the allegations upon which so much weight is now placed. It simply contends, among other things, that Petitioner waived its right to enforce the grievance and arbitration provisions of the agreement by "engaging in a 'walkout' in violation of the contract, instead of relying on the agreement to arbitrate" (R. 42). Petitioner admitted that certain employees left their jobs (R. 34). The trial court referred to the "walkout", noted the undisputed fact that it did take place (R. 48-49), and concluded "that plaintiff has waived its right to arbitration in this case by electing the walkout or strike . . ." (R. 50). The Supreme Court of Iowa summarized Respondent's point of law in these words: "Plaintiff not entitled to relief since it has waived the right to enforce arbitration provision, by the walkout . . ." (R. 56). It ruled that "the trial court was correct in holding the Union had waived its right to arbitrate the grievances filed by its walkout" (R. 59).

In short, the issue framed by Respondent's own application to the trial court, which the trial court decided, centered upon the "walkout", *a walkout which Petitioner conceded.* At no point in the trial court did Respondent raise the point, or seek to take advantage of it, that Petitioner had not replied to the allegations of fact contained in Respondent's Answer to Petitioner's Amendment to Petition.

Having failed to raise in the trial court Petitioner's failure to file a further reply, Respondent cannot take advantage of the absence of a formal denial on appeal. *Banks v. Carrell*, 241 Iowa 786, 43 N. W. 2d 142 (1950); cf. *Federated Mutual Implement & Hardware Ins. Co.*, 252

Iowa 1208, 110 N. W. 2d 264 (1961). Respondent's attempt in this Court to construe the pleadings in such fashion as to disclose an admission of an intentional breach of contract is not in order.

III.

IN THE ABSENCE OF CONTRACTUAL LANGUAGE EXCLUDING THE GRIEVANCES FROM THE PROVISIONS OF THE ARBITRATION CLAUSE, ONLY THE MOST UNEQUIVOCAL INDICATION OF TOTAL REPUDIATION OF THE CONTRACT WOULD WARRANT A COURT'S REFUSING TO ORDER ARBITRATION. THE EFFECTS OF THE CLAIMED STRIKE ARE FOR THE ARBITRATOR TO DECIDE.

1. At times Respondent's Brief (pp. 18-31) reads as though Respondent assumes that Petitioner is seeking a determination that *all issues* arising out of a strike must be submitted to arbitration. Thus Respondent points to the undesirable consequences which might flow from "an absolute restriction preventing the employer from enforcing his contractual guarantee of freedom from strikes except through the mechanics of arbitration . . ." (Brief, p. 22). The very caption of Point II of Respondent's Brief—"This Court Has Not Held that an Employer Will Always Be Compelled to Arbitrate the Breach of a No-Strike Clause" (p. 18)—suggests that Respondent believes that a reversal of the Supreme Court of Iowa requires holding that "an employer will always be compelled to arbitrate" such a breach.

Petitioner's argument does not lead to that conclusion. As stated in Petitioner's Brief (p. 22), even if Respondent were "compelled to arbitrate," it could still "press its claim for damages for breach of contract." For, clearly, the arbitration clause in the present case is not so broad or all-inclusive as that in *Drake Bakeries, Inc.* v. *Local 50,*

American Bakery and Confectionery Workers, 370 U. S. 254 (1962). At no point has Petitioner asserted that Respondent must *arbitrate* its claim for damages. On the contrary, Petitioner has at all times emphasized that Respondent's contractual remedy, namely, a suit for breach of contract under Section 301, is available to Respondent, regardless of how an arbitrator might decide the grievances. That judicial remedy is not affected by Petitioner's demand for arbitration, nor will it be affected by a court decision requiring that the pending grievances be submitted to the arbitrator.

Respondent confuses contractual undertakings with remedies available to the parties in the event of breach. No one pretends that a no-strike clause guarantees an employer against strikes; while such a provision may substantially reduce their likelihood, it cannot literally provide an employer with what Respondent describes as a "contractual guarantee of freedom from strikes . . ." (Brief, p. 22). If such a clause is violated by the union, however, the employer has his remedy under Section 301—an action for damages for breach of contract. An employer may be influenced to enter into a collective agreement by the assurance the no-strike clause gives him, and by his belief that the danger of strikes is thereby substantially diminished, but, if he is realistic, he also necessarily must place reliance upon the remedy available to him in the event the union, notwithstanding its contractual obligation, goes on strike. Here, Respondent has a counterclaim for damages pending in the Iowa courts (R. 33). At least in part, that is what Respondent bargained for.

Having intimated, erroneously, that Petitioner's position requires it to urge that only an arbitrator can decide "whether or not the union has fulfilled its contract obligation to refrain from a strike" (Respondent's Brief, p. 18), Respondent seemingly also contends that the present

arbitration clause, which leaves to the employer his right to sue for breach of contract (unlike the provision in *Drake Bakeries*), is evidence that "the scope of the arbitration clause does not reach to embrace walkouts or strikes amounting to a substantial breach" (Brief, p. 25). It is difficult to see how the employer's retention of his right to sue evidences anything more than his unwillingness to have an arbitrator decide whether or not, in the event of a strike, he is entitled to damages. In contrast to the employer in *Drake Bakeries*, Respondent wanted the right to go to court for damages for breach of the no-strike clause. That right he has.

The retention and exercise of that right, however, do not diminish the scope of arbitration of grievances growing out of a walkout or a strike. The question of what must be submitted to arbitration depends upon the terms of the arbitration clause; if the clause contains the usual language regarding a dispute "with reference to the proper interpretation or application of the provisions of this contract," there must be express exclusionary language to justify determining that a dispute on its face involving the interpretation or application of the provisions of the contract is not arbitrable. Here the contract (R. 19) contains the usual language, as did the contracts in the *Steelworkers* cases.*

Further, there is no express exclusion of discharge cases growing out of a strike situation. Respondent seeks to imply such an exclusion from its refusal to "bargain away" its right to sue for damages for violation of the no-strike clause. This Court has determined, however, that "[a]part from matters that the parties *specifically exclude*, all of

* *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 565; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 576; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 594.

the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions. . . ." (Emphasis added.) *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960).

The Court of Appeals in *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F. 2d 217, 219 (C. A. 4th 1963), cert. den. 11 L. Ed. 2d 53 (1963), considered significant the absence of a specific exclusion:

> . . . [S]ince discharges for engaging in strikes have not been explicitly excluded from the coverage of the arbitration agreement, we are not persuaded that the discharges in issue are not "[g]rievances arising out of the operation and interpretation of this [collective bargaining] agreement involving wages . . . hours, or other conditions of employment . . ."

2. Respondent also appears to believe that Petitioner would relieve the courts "of any obligation to resolve the issue of arbitrability . . ." (Brief, p. 29). This is plainly not so. Petitioner argued in its Brief (pp. 12-14) that the role of a court confronted with a suit to compel a reluctant party to arbitrate is a restricted one, which requires it to avoid entanglement in the merits of the grievance. This argument does not deprive the court of its right, initially, to determine arbitrability. It does, of course, emphasize that "the function of the court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 567-68 (1960).

Respondent's approach requires a court to abandon that limited role. It would have the court look beyond the provisions of the contract and decide not only whether the walkout or strike amounted to a "substantial breach," but also whether the employer thereupon "repudiated its col-

lective bargaining obligations, unequivocally and in full . . ." (Brief, pp. 25, 27). The difficulty with this position is that almost inevitably it results in the court's involvement in the merits of a grievance which arises in the context of a strike.

There may be situations, however infrequent, in which parties to a contract have so completely repudiated all dealings with each other that no shred of the agreement survives. But collective bargaining in contemporary American industry anticipates something more than a transient relationship. Whatever may be the situation with commercial contracts, a collective bargaining agreement between an employer and a union is not to be viewed, and the parties ordinarily do not regard it, as mere surplus cargo to be jettisoned at the first blow of stormy industrial weather. There must be literally hundreds of collective bargaining agreements in effect today which have survived lengthy strikes, lawsuits, monetary judgments against unions, and innumerable arbitration awards. Even if the facts surrounding a labor-management dispute were to lead inescapably to the conclusion that total breach had occurred, it does not follow that the arbitration clause could not survive. Cf. *Drake Bakeries* v. *Local 50, American Bakery & Confectionery Workers Int'l, AFL-CIO*, 370 U. S. 254, 262-63 (1962).

In any event, once it is determined that the arbitration clause is "susceptible of an interpretation that covers the asserted dispute," *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582 (1960), the crucial question is: *who is to decide* that there has been a substantial or total breach, or an unequivocal repudiation of collective bargaining obligations, or a willingness on the part of the employer "to cast off the contract and sever all relations with the union. . ." (Respondent's Brief, p.

27). For Petitioner to urge that in all but the most unlikely case these questions are for the arbitrator is not to argue that "the question of arbitrability is excluded from judicial determination" (Respondent's Brief, p. 12). Rather, it is to limit the judicial function to what this Court has viewed it to be and to implement the policy of keeping courts from becoming enmeshed in the merits of grievances.

In the present case, Respondent is entitled to argue, and to introduce evidence to support its contentions that: 1) the union engaged in a strike in violation of its contractual commitment; 2) that the strike justified Respondent in discharging a number of employees; 3) that the conduct of Petitioner and the employees constituted so complete a destruction of the contract relationship as to warrant Respondent in treating the contract at an end and as no longer imposing on it any obligation to arbitrate; and 4) that the acts of Petitioner constituted a waiver of its contractual rights to require arbitration of the discharges.

The fundamental question upon which Petitioner and Respondent differ has to do with *who is to hear and decide Respondent's contentions*. Respondent claims that the court must decide them because they are part of the judicial issue of arbitrability. Petitioner claims that the arbitrator must decide them because the parties have contracted for arbitration of disputes having to do with "the proper interpretation or application of the provisions of [the] contract. . ."

What is particularly significant about Respondent's contentions is that they are put forward *both* as defenses to the merits of the grievances *and* as defenses to Petitioner's claim that the grievances should be arbitrated. It would require judicial tight-rope walking of a very high order to decide Respondent's defenses to the demand for arbitration

without at the same time considering the merits of the grievances. This Court has instructed the lower courts to avoid becoming "entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause. . ." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 585 (1960). Is it not equally important for the lower courts to avoid such entanglement even through the back gate of weighing acts and statements of parties engaged in a fast-breaking industrial altercation? An altercation leading, according to one side, to a total break of all relations between the parties, and according to the other, to improper employee discharges?

3. Respondent endeavors to employ the criteria announced in *Drake Bakeries* v. *Local 50, American Bakery and Confectionery Workers*, 370 U. S. 254, 257, 261 (1962), to support the view of the Iowa Court that arbitration was not required. As applied to the facts here, these indicia do not lead to the result Respondent seeks.

First, so far as the "scope of the commitment to arbitrate" (Respondent's Brief, p. 25) is concerned, the contract provision here is broad and there is no exclusionary clause of any kind (R. 18-20).

Second, "the employer's actions following breach of the no-strike provision" do not support the conclusion that Respondent "repudiated its collective bargaining obligations, unequivocally and in full. . ." (Brief, pp. 25, 27). Presumably, on Respondent's view, its filing a counterclaim for damages is not an indication that in any respect it affirms the contract (cf. Respondent's Brief, pp. 25-26). The facts upon which Respondent seeks to rest the conclusion of total repudiation are set forth entirely in its Answer to Plaintiff's Amendment to Petition (R. 40-41); as indicated in Point II above, Respondent is not entitled to treat

these allegations as though undenied. Furthermore, even if the allegations of paragraph 2 of that pleading (R. 41) are taken to be literally true, they do not say anything, even by way of conclusion, to the effect that Respondent repudiated or cast off the contract or severed all relations with the union. According to Respondent's version, as pleaded, it took no express action to discharge the employees; rather, the men ceased to be employees by reason of their own voluntary refusals to accept an offer to return. All this, and the decision to fill the employees' jobs by permanent replacements, took place, according to the Respondent's version (R. 41) on May 15, 1961—or precisely four days after the men are claimed to have walked out.

Third, in this context it is not clear what Respondent means by asserting that the strike "was of extended duration" (Brief, p. 28). If the employees ceased to be employees of Respondent on May 15, 1961 and were permanently replaced, their continuing to protest and picket does not convert a four-day strike into a protracted one. In light of Respondent's pleading, it might properly be suggested that, commencing on May 15, 1961, the employees were locked out. Taking the facts as Respondent alleges them, therefore, Respondent's view is that a four-day walkout justifies total repudiation of the contract, while a one-day walkout would not.

It could be, of course, that if the full background of the dispute were ever heard—as it could be before an arbitrator—the events of May 1961 might not be so one-sided as Respondent's pleading suggests. The special competence of an arbitrator, once his services were brought to bear on the dispute, could lead to resolutions—favorable to the continuation of collective bargaining between the parties—which, on the bare record before the Iowa courts and this Court, might seem improbable. The end result might be

a return of the employees to their jobs, a resumption of dealings between the union and the employer, and a continuing effort by Respondent to convert its counterclaim into the balm of monetary damages. If every three- or four-day walkout put a permanent end to labor-management relations between the parties, many agreements would never live out their terms. The preferred course must be arbitration and reconciliation, not an unending state of cold war.

The strikes in *Drake Bakeries, supra,* in *Retail, Wholesale and Department Store Union, Local 1065* v. *Vaughn's Sanitary Bakery, Inc.*, 196 F. Supp. 633 (M. D. Pa. 1961), and in *International Moulders & Foundry Workers* v. *Susquehanna Casting Co.*, 283 F. 2d 80 (1960); were one-day affairs. There had been a walkout or work stoppage in *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 595 (1960); arbitration was nonetheless ordered. In *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), despite a context of numerous work stoppages and strikes over a period of many months, it appears to have been contemplated by the parties that fourteen grievances would be arbitrated. In *Local 748, International Union of Electrical, Radio and Machine Workers* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (C. A. 6th 1963), a month and a half elapsed between the commencement of the strike and the employer's advising the employees who were still striking that they were discharged. And in *Armstrong-Norwalk Rubber Corp.* v. *United Rubber Workers, Local 283*, 167 F. Supp. 817 (D. C. Conn.), the strike lasted five weeks and substantially stopped production.

It is not likely that a sensible rule could be devised which would make arbitrability depend, in a strike situation, upon the number of days the strikers were out. In some instances a three-hour stoppage is more serious than a three-day walkout. Some employers, in times of declining sales,

view a strike with the greatest equanimity, though at other times it would mean a real economic pinch. Surely the better practice would be to leave the effect and the cause of a claimed strike, *insofar as they relate to the merit or lack of merit of the grievances*, to the arbitrator.

Respondent insists that the court, initially and as part of its task of determining arbitrability, must pass upon the effect of the strike. As Respondent states it, "the governing issue before the Iowa courts was the propriety of the employer's repudiation of a collective bargaining contract, including its arbitration provisions" (Brief, p. 31). But Respondent does not explain how a court could rule upon that question without reaching the merits of the grievances. Surely a four-day strike is not the occasion to weaken the injunction that in suits to compel arbitration "courts . . . have no business weighing the merits . . ." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960).

CONCLUSION.

For the foregoing reasons, Petitioner urges that the decision of the Supreme Court of Iowa be reversed.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
IRVING M. KING,
HARRY H. SMITH,
Attorneys for Petitioner.

COTTON, WATT, ROCKLER & JONES,
105 W. Adams Street,
Chicago 3, Illinois,

HARRY H. SMITH,
234 Badgerow Building,
Sioux City, Iowa.